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In The Supreme Court of the United States

DALLAS E. BUTLER, JEANNIE C. DE LAMOS, ALAN J. DE SA, TOM GAMBLE, WOODROW M. HASSINGER, RUDY MACK, SR., JOE R. MCCABE, PHILIP B. NASH, MICHAEL L. OKSNER, WILLIAM SIEGEL, PAUL TURNER III, AND ARTHUR B. WARD,

Petitioners,

v.

FEDERAL AVIATION ADMINISTRATION, AND UNITED STATES OF AMERICA,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR WRIT OF CERTIORARI WITH APPENDIX

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QUESTIONS PRESENTED

1. Whether a regulatory agency decision, based on falsified data, is inherently arbitrary and fails to meet the substantial evidence test.

2. Whether a lower court judgment, deferring to a regulatory agency's misrepresentation of both the factual record and the nature of the cause of action, should be reversed.

PARTIES TO THE PROCEEDING

The parties to this proceeding are identified in the caption of the case. No corporation is a party to this case.

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No._____

In the Supreme Court of the United States

DALLAS E. BUTLER, JEANNIE C. DE LAMOS, ALAN J. DE SA, TOM GAMBLE, WOODROW M. HASSINGER, RUDY MACK, SR., JOE R. MCCABE, PHILIP B. NASH, MICHAEL L. OKSNER, WILLIAM SIEGEL, PAUL TURNER III, AND ARTHUR B. WARD,

Petitioners,

V.

FEDERAL AVIATION ADMINISTRATION, AND UNITED STATES OF AMERICA,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

Dallas E. Butler *et al.*, the petitioners, respectfully request a writ of *certiorari* to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

OPINION BELOW

The September 24, 2004 Judgment of the United States Court of Appeals for the District of Columbia Circuit (D.C. Circ. no. 03-1386) is reproduced in the Appendix at page 1a. The December 14, 2005 Order of the United States Court of Appeals for the District of Columbia Circuit denying the petitioners' timely request for rehearing and

request for rehearing *en banc* is reproduced in the Appendix at page 28a.

JURISDICTION

The Federal Aviation Administration executed its Denial of Exemption on October 6, 2003 (reproduced in the Appendix at page 3a). The jurisdiction of the United States Court of Appeals for the District of Columbia Circuit was invoked pursuant to 49 U.S.C. § 46110(a). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254 and Supreme Court Rule 10(c), inasmuch as the United States Court of Appeals for the District of Columbia Circuit has decided an important question of federal law that has not been, but should be, settled by this Court.

RELEVANT STATUTES AND REGULATIONS

14 C.F.R. § 121.383(c) provides:

> "No certificate holder may use the services of any person as a pilot on an airplane engaged in operations under this part if that person has reached his 60th birthday. No person may serve as a pilot on an airplane engaged in operations under this part if that person has reached his 60th birthday."

49 U.S.C. § 44701(f) provides:

> "The Administrator may grant an exemption from a requirement of a regulation prescribed under subsection (a) or (b) of this section or any of sections 44702-44716 of this title if the Administrator finds the exemption is in the public interest."

49 U.S.C. § 44703 provides:

"The Administrator of the Federal Aviation Administration shall issue an airman certificate to an individual when the Administrator finds, after investigation, that the individual is qualified for, and physically able to perform the duties related to, the position to be authorized by the certificate."

49 U.S.C. § 40101(a) provides:

"In carrying out subpart II of this part and those provisions of subpart IV applicable in carrying out subpart II, the Secretary of Transportation shall consider the following matters, among others, as being in the public interest and consistent with public convenience and necessity:

(1) assigning and maintaining safety as the highest priority in air commerce.

* * *

(4) the availability of a variety of adequate, economic, efficient, and low-priced services without unreasonable discrimination or unfair or deceptive practices.

(5) coordinating transportation by, and improving relations among, air carriers, and encouraging fair wages and working conditions.

* * *

(B) to encourage efficient and well-managed air carriers to earn adequate profits and attract capital, considering any material

> differences between interstate air transportation and foreign air transportation.
>
> * * *
>
> (9) preventing unfair, deceptive, predatory, or anticompetitive practices in air transportation.
>
> * * *
>
> (15) strengthening the competitive position of air carriers to at least ensure equality with foreign air carriers, including the attainment of the opportunity for air carriers to maintain and increase their profitability in foreign air transportation.
>
> (16) ensuring that consumers in all regions of the United States, including those in small communities and rural and remote areas, have access to affordable, regularly scheduled air service."

The Information Quality Act (Section 515(a) of the Treasury and General Government Appropriations Act for Fiscal Year 2001 (Pub. L. No. 106-554; H.R. 5658)) provides:

> "The Director of the Office of Management and Budget shall, by not later than September 30, 2001, and with public and Federal agency involvement, issue guidelines under sections 3504(d)(1) and 3516 of title 44, United States Code, that provide policy and procedural guidance to Federal agencies for ensuring and maximizing the quality, objectivity, utility, and integrity of information (including statistical information) disseminated by Federal agencies in fulfillment of the purposes and

> provisions of chapter 35 of title 44, United States Code, commonly referred to as the Paperwork Reduction Act."

The Paperwork Reduction Act, 44 U.S.C. § 3501, provides:

> "The purposes of this subchapter are to...
>
> (2) ensure the greatest possible public benefit from and maximize the utility of information created, collected, maintained, used, shared and disseminated by or for the Federal Government;
>
> ***
>
> (4) improve the quality and use of Federal information to strengthen decisionmaking, accountability, and openness in Government and society;
>
> ***
>
> (8) ensure that the creation, collection, maintenance, use, dissemination, and disposition of information by or for the Federal Government is consistent with applicable laws...."

Office of Management and Budget, Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies (Republication; 67 Fed. Reg. 8452 *et seq.*, Feb. 22, 2002) provide, in part:

"These final guidelines implement section 515 of the Treasury and General Government Appropriations ct for Fiscal Year 2001 (Public Law 106-554; H.R. 5658). .... It is crucial that information Federal agencies disseminate meet thee guidelines. .... These guidelines apply to agencies subject to the Paperwork Reduction Act (44 U.S.C. chapter 35). Agencies are directed to develop information resources management procedures for reviewing and substantiating (by documentation or other means selected by the agency) the quality (including the objectivity, utility, and integrity) of information before it is disseminated. In addition, agencies are to establish administrative mechanisms allowing affected persons to seek and obtain, where appropriate, correction of information disseminated by the agency that does not comply with the OMB or agency guidelines. ....

"'With regard to analysis of risks to human health, safety and the environment maintained or disseminated by the agencies, agencies shall either adopt or adapt the quality principles applied by Congress in the Safe Drinking Water Act Amendments of 1996 (42 U.S.C. 300g-1(b)(3)(A) & (B)).' ....

"'Objectivity' includes whether disseminated information is being presented in an accurate, clear, complete, and unbiased manner. This involves whether the information is presented within a proper context."

The Safe Drinking Water Act Amendments of 1996 (42 U.S.C. 300g-1(b)(3)) provide:

> "(A) Use of science in decisionmaking
> In carrying out this section, and, to the degree that an Agency action is based on science, the Administrator shall use–
>
> (i) the best available, peer-reviewed science and supporting studies conducted in accordance with sound and objective scientific practices; and
>
> (ii) data collected by accepted methods or best available methods (if the reliability of the method and the nature of the decision justifies use of the data)."

5 U.S.C. § 706 provides:

> "To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall–
>
> (1) compel agency action unlawfully withheld or unreasonably delayed; and
>
> (2) hold unlawful and set aside agency action, findings, and conclusions found to be–
>
> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
>
> (B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

"In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error."

WHAT IS SOUGHT

The petitioners, pursuant to 49 U.S.C. § 44701(f), seek exemption from 14 C.F.R. § 121.383(c), the age 60 rule, which prohibits commercial airline pilots from flying beyond age 59. The Federal Aviation Administration, relying on intentionally falsified age-safety data, has maintained a rigid policy of denying all age exemption requests. The judgment of the United States Court of Appeals for the District of Columbia Circuit rested on two premises - both factually incorrect: (1) that the petitioners had provided no information about themselves, and (2) that the petitioners challenged the validity of the age 60 rule. The petitioners ask that their requests for exemption be considered on the merits.

STATEMENT OF THE CASE

The petitioners filed a petition with the Federal Aviation Administration ("the FAA," "the agency") on June 10, 2002, pursuant to 49 U.S.C. § 44701(f), requesting exemption from 14 C.F.R. § 121.383(c), the age 60 rule. The petitioners subsequently filed three amendments to that petition, the last being filed on August 20, 2003. The Federal Aviation Administration on October 6, 2003 issued an order denying that petition. The petitioners, pursuant to 49 U.S.C. § 46110(a), petitioned the United States Circuit Court of Appeals for the District of Columbia, requesting judicial review of that order. The Court of Appeals issued a judgment on September 24, 2004, upholding the agency's decision. The petitioners on November 18, 2004 petitioned for rehearing and for rehearing *en banc*, and the Court of Appeals issued a decision on December 15, 2004 denying that request. The petitioners here petition the Supreme Court for a writ of *certiorari*.

FACTS MATERIAL TO QUESTIONS PRESENTED

The 12 petitioners, both active and retired commercial airline pilots around age 60, petitioned the Federal Aviation Administration ("the FAA," "the agency") for exemption from 14 C.F.R. § 121.383(c), a regulation that prohibits such pilots from flying beyond age 59. In petitioning the agency, they relied on 49 U.S.C. § 44701(f), which empowers the agency to grant such exemptions in the public interest. (Pet. 1-3; Pet. 3d Amend.[1])

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[1] Pet. 1-3 refers to pages 1 through 3 of the pilots' petition to the FAA. Pet. 3d Amend. refers to the third amendment to the pilots' petition to the FAA. That petition and its amendments are reproduced in the Appendix at page 207a.

The pilots' petition to the FAA presented information regarding their qualifications, including the facts that they have unblemished medical and safety performance records; that they are far better qualified than recovering alcoholics, heart patients and other ill pilots often granted exemptions to fly; that their experience renders them better qualified than younger pilots to handle unexpected incidents and emergencies in flight; that they are ready and willing to continue flying in the public interest; and that both they and the airlines' passengers suffer irreparable harm as a proximate result of an unwritten policy of the FAA automatically to deny all age exemption requests. (Pet. 1-3, 6-7.)

Their petition to the agency also provided extensive documentation showing that the FAA for decades has misrepresented both the purpose of its no-exemptions policy and the data that purportedly justifies it. The petitioners' exhibits showed that a former FAA Administrator, two Federal Air Surgeons and other FAA officials privately have conceded that their enforcement of the age 60 rule never had anything to do with safety. (Pet. 55-56; Pet. Exh. EE, FF.[2]) This record showed further that the FAA has relied on falsified age-safety statistics to justify its policy of no age exemptions. (Pet. 23-36, 57-63; Pet. Exh. Q.)

Exhibits presented with the pilots' petition to the FAA documented that FAA officials privately have conceded that the only reason for rigid enforcement of the rule was a supposed economic favor to certain airline interests. The record showed that favoritism initially was meant to benefit an executive who had lost a series of labor arbitrations over his company's age 60 retirement policy,

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[2] Pet. Exh. EE, FF refers to exhibits EE and FF of the pilots' petition to the FAA. Exhibits to that petition, including internal FAA memoranda and hand-written documents, are provided in the record (D.C.Cir., J.A.A.).

and later was supposed to benefit airline executives who would find it administratively inconvenient to alter their retirement programs. (Pet. Exh. 10-17; Pet. Exh. B, C, J.)

In fact, it is undisputed that the airline industry and airline unions increasingly are opposed to the FAA's inflexibility in grounding all the pilots on their 60th birthday. (Pet. 2d Amend.; Southwest Airlines *amicus curiae* brief.[3]) It also is undisputed that Europe, Japan, Australia and others around the world have recognized the fallacy of, and declined to imitate, the FAA's age policy. Pet. 69-70.

In their petition to the FAA, the pilots did not challenge the legal validity of the age 60 rule, 14 C.F.R. § 121.383(c). Rather, they asked the agency to exercise its statutory authority, under 49 U.S.C. § 44701(f), to grant their request for exemption from the age 60 rule, in the public interest. (Pet. 2, 5, 75-76.)

REASONS FOR GRANTING THE WRIT

I. A regulatory agency decision, based on falsified data, is inherently arbitrary and fails to meet the substantial evidence test.

The Administrative Procedures Act, 5 U.S.C. § 706, provides that, in reviewing an agency action, the court shall "hold unlawful and set aside agency action, findings, and conclusions found to be... arbitrary, capricious, an abuse of discretion, or... unsupported by substantial evidence...."

The measure of "substantial evidence" is found in judicially manageable standards. *Steenholdt v. F.A.A.*, 314 F.3d 633, 638 (D.C. Cir. 2003). See also *Chlorine Chemistry Council v. E.P.A.*, 206 F.3d 1286, 1290-91 (D.C. Cir. 2000).

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[3] Southwest Airlines *amicus curiae* brief being filed in support of this petition for *certiorari*.

Judicially manageable standards are to be found in regulations. *Padula v. Webster*, 822 F.2d 97, 100 (D.C. Cir. 1987).

The FAA's use of concededly false age-safety data in its denial of the pilots' request for exemptions failed to comply with mandatory standards established in the Information Quality Act of 2000 (section 515 of the Treasury and General Government Appropriations Act for Fiscal Year 2001 (Pub. L. No. 106-554; H.R. 5658)). It also violated guidelines pursuant to those statutory standards (Office of Management and Budget, Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies; Republication; 67 Fed. Reg. 5365 et seq., Feb. 5, 2002). The agency's impunity defies of the rule that, so long as a federal regulation exists, the Executive Branch is bound by it (*U.S. v. Nixon*, 418 U.S. 683, 695 (1974)).

Even if the guidelines were not binding per se, nevertheless they supplied standards judicially manageable for the purpose of defining arbitrary and capricious conduct, abuse of agency discretion, and lack of substantial evidence.

Judicially manageable standards also are to be found in statutes that circumscribe agency discretion. *Lincoln v. Vigil*, 508 U.S. 182, 193 (1993). Congress has ordered such standards in statutes that delimit FAA's discretion in deciding whether to grant the exemptions sought by the petitioners. Thus the agency must consider implications of safety foremost, but also effects on national defense, aviation economics and the international competitiveness of U.S.-based airlines. (49 U.S.C. § 40101(a).)

The FAA has been unable to refute the fact that multi-pilot crews, redundant pilot-copilot communication procedures, and modern cockpit technology, create a fail-safe system to prevent an accident even if the pilot, regardless of age, were to become incapacitated. (Pet. 41-54.) Required simulator testing, frequent medical examinations, and constant monitoring of performance weed out potentially deficient pilots, regardless of age. Those who continue to fly airliners are a super-select population of extraordinarily fit and able individuals.

The FAA has relied on distorted statistics which show that older pilots of small airplanes have a higher accident rate than younger pilots of large airliners. This methodologically false comparison is not valid, because small aircraft tend to have much higher accident rates than airliners, and the rates are not age-related. The agency long has been aware of deficiencies in age-safety data on which it has relied. *Yetman v. Garvey*, 261 F.3d 664, 677 (7th Cir. 2001). FAA officials quietly conceded flaws in data that the agency nevertheless relied on in its public statements and decisions.

The experience of other major air powers worldwide confirms that qualified pilots over age 59 continue to fly safely. The FAA has not identified a single airliner accident attributable to the age of a pilot.[4]

The FAA's inflexible policy of denying all age exemption requests is the epitome of arbitrariness. The FAA's decision, denying the petitioners' request for exemption from the age 60 rule, was arbitrary and failed to meet the test of substantial evidence.

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[4] The FAA's final brief, filed with the United States Court of Appeals for the District of Columbia Circuit, is reproduced in the Appendix at page 129a.

II. A lower court judgment, deferring to a regulatory agency's misrepresentation of both the factual record and the nature of the cause of action, should be reversed.

The Administrative Procedures Act, 5 U.S.C. § 706 provides that the reviewing court, in determining whether to set aside an agency action, "shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error."

Persons harmed by an agency action have a right of judicial review. *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140 (1967). Persons harmed by an agency's dissemination of questionable data are entitled to their day in court (*Tozzi v. U.S. Dept. of Health and Human Services*, 271 F.3d 301, 307 (D.C. Cir. 2001). No judicial deference is owed to the FAA's authority when the government's own data suggests the contrary (*U.S. Air Tour Ass'n v. FAA*, 298 F.3d. 997, 1018 (D.C. Cir. 2002). The courts owe no deference to an agency that misrepresents material facts.

The Judgment of the United States Court of Appeals for the District of Columbia Circuit in this case appeared to be based on little more than a reading of the first page of the FAA's disingenuous argument. It adopted the government's *factually incorrect* claims – that petitioners had provided no specific information showing why the requested exemptions would not adversely affect safety, and that the petitioners had challenged the legal validity of the age 60 rule, 14 C.F.R. § 121.383(c). As outlined above, the record shows that the pilots' petition to the FAA provided extensive specific information showing why the requested exemptions would not adversely affect safety. Furthermore, the petitioners plainly did not challenge the legal validity of the age 60 rule, 14 C.F.R. § 121.383(c). As cited above, and as the record plainly shows, the 12 pilots petitioned, in accordance with

49 U.S.C. § 44701(f), for lawful exemption from the concededly valid rule.

Relevant facts and law were expounded to the United States Court of Appeals for the District of Columbia Circuit in the Final Brief for the Petitioners (reproduced in the Appendix at page 56a); an *Amicus Curiae* Brief by the Southwest Airline Pilots Association (reproduced in the Appendix at page 194a); and the Petitioners' Amended Petition for Rehearing *En Banc* (reproduced in the Appendix at page 29a).

By deceptively equating the pilots' request for exemptions to a legal challenge to the validity of the regulation, the FAA induced the court below to deny the pilots a hearing based on the facts and the law. Judgment based on fallacy fails.

CONCLUSION

The Federal Aviation Administration should be required to decide petitions for exemption on the merits, not on the basis of an arbitrary policy. The agency should be required to base its practices on relevant facts and law, not falsified data. It should be required to disclose, not misrepresent, the purposes of its policies.

If rigid enforcement of the age 60 rule ever served any valid purpose (a doubtful proposition at best), it certainly outlived its usefulness long ago. Stereotypical images of 60-year-olds that commonly were accepted in our society in the 1950s are no justification for arbitrary actions by a federal agency in the 21st century. Technology, medicine, and aviation have advanced.

Our understanding of the duty of government officials in a democracy to tell the truth and follow the law also, hopefully, has advanced. The elected representatives of the people, who enacted the statute allowing for exemptions, expressly provided for exemptions to be granted in the public interest. (49 U.S.C. § 44701(f).)

For these reasons, and for the other reasons set forth above, the Judgment of the United States Court of Appeals for the District of Columbia Circuit should be reversed. The petitioners should be granted the exemptions requested. Alternatively, the case should be remanded so that their requests for exemption may be decided individually on the merits, and not subject to an arbitrary policy of denial.

Respectfully submitted,

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United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 03-1386 September Term, 2004

Dallas E. Butler *et al.*,
Petitioners,

v.

Federal Aviation Administration,
Respondent.

On Petition for Review of an Order of
the Federal Aviation Administration.

Before: EDWARDS, HENDERSON and GARLAND,
Circuit Judges.

JUDGMENT

[ENTERED: SEPTEMBER 24, 2004]

This cause was considered on the record from the Federal Aviation Administration (FAA) and on the briefs by counsel. The petitioners, who are licensed and certified pilots over age 60, seek review of an FAA order denying their applications for exemption from the "Age 60 Rule," 14 C.F.R. § 121.383(c), which prohibits a pilot from serving on a commercial airplane after his 60th birthday. Although the petitioners purport to seek an "exemption," the petition lacks specific information to justify exempting the individual petitioners as required under the FAA regulations. *See* 14 C.F.R. § 11.61 ("You must include the following information in your petition for an exemption...The reasons why granting the exemption would not adversely affect safety, or how the exemption would provide a level of safety at least equal to that

provided by the rule from which you seek the exemption...."). It is plain from the petitioners' arguments before the agency and before the court that they initiated this proceeding in order to challenge directly the validity of the rule itself, which is properly effected only through a petition for rulemaking rather than a petition for exemption. *See* 14 C.F.R. §§ 11.61, 11.73; *see also Yetman v. Garvey*, 261 F.3d 664, 668-69 (7th Cir. 2001); *Keating v. FAA*, 610 F.2d 611, 612 (9th Cir. 1979); *Rombough v. FAA*, 594 F.2d 893, 897 (2nd Cir. 1979). Accordingly, it is

ORDERED that the petition for review is denied.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or rehearing en banc. *See* Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

FOR THE COURT:

/s/
Mark J. Langer, Clerk

Exemption No. 8141

UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, DC 20591

In the matter of the petition of

BUTLER, DALLAS E. ET AL

for an exemption from § 121.383(c)
of Title 14, Code of
Federal Regulations

Regulatory Docket No. FAA-2002-12501

DENIAL OF EXEMPTION

[ENTERED: OCTOBER 6, 2003]

By petition received on June 13, 2002, Mr. Anthony P. X. Bothwell, Esquire, Attorney for Petitioners, 100 First Street, Suite 100 PMB241, San Francisco, California 94105-2632, petitioned the Federal Aviation Administration (FAA) on behalf of Dallas E. Butler et al for an exemption from § 121.383(c) of Title 14, Code of Federal Regulations (14 CFR). The proposed exemption, if granted, would permit the petitioners to act as pilots in operations conducted under part 121 after reaching their 60th birthdays.

The petitioners request relief from the following regulation:

Section 121.383(c) prescribes, in pertinent part, that no person may serve as a pilot on an airplane engaged in operations under this part if that person has reached his 60th birthday.

The petitioners support their request with the following information:

The petitioners claim the Age 60 rule has no medical or safety basis, instead, petitioners assert the Age 60 rule was originally adopted as an act of favoritism and continues to be supported by the FAA as an economic favor to the airline industry. Petitioners allege the FAA has intentionally misrepresented the justification for the Age 60 rule to the public, Congress, Federal courts, and other executive agencies. Petitioners claim they are entitled to be exempt from the Age 60 rule because the rule has no medical or safety basis and, therefore, granting them an exemption to the rule will not adversely affect safety.

Petitioners allege prior to the issuance of the Age 60 rule in 1959 there was no medical or safety basis for the rule. Petitioners allege the true purpose for the Age 60 rule was a personal favor between FAA Administrator Elwood Quesada and American Airlines Chairman C.R. Smith.

Petitioners claim that the Age 60 rule was adopted because American Airlines Chairman Smith contacted Administrator Quesada to request the FAA adopt a mandatory retirement rule to settle an ongoing pilot strike.

Petitioners assert the FAA continues to enforce the Age 60 rule so that airline companies will not be burdened with any administrative costs that may be associated with having to change retirement policies currently based on the age of 60. Petitioners cite correspondence between a former Federal Air Surgeon and a former FAA employee and a closed meeting between a congressman and FAA officials as evidence of this economic conspiracy.

Petitioners allege the FAA intentionally insulated itself from independent administrative review by adopting the Age 60

rule as an operational restriction under section 601 of the Federal Aviation Act of 1958 (now codified at 49 U.S.C. § 44701). Petitioners allege the FAA purposefully did not locate the Age 60 rule under section 602 of the 1958 FAA Act (now principally codified at 49 U.S.C. § 44703) as a licensing restriction that would be reviewed by the National Transportation Safety Board.

Among the many allegations leveled by the petitioners against the FAA are the following concerning studies in support of the Age 60 rule: the FAA continues to intentionally and purposefully fabricate and disseminate false and misleading data to support the rule and the FAA distorted data and endorsed and promoted flawed studies to support the rule; the FAA has ignored expert panel reports that disprove medical arguments supporting the rule; the FAA has refused to collect data, make data available that has been collected, or analyze data that has been collected that would undermine the Age 60 rule. Petitioners contend the FAA's reliance on one particular allegedly flawed study in support of the Age 60 rule, the Flight Time Study, conducted by Richard Golaszewski, constitutes intentional misrepresentation by the FAA to Congress and the U.S. Court of Appeals for the Seventh Circuit. Finally, petitioners allege the U.S. Senate Committee on Appropriations ordered the FAA to conduct a study in a 2000 appropriations bill. The petitioners allege that there is "evidence of the FAA's intent - perhaps even its complicity with the [Senate Appropriations] Committee - to mislead."[1]

Petitioners allege pilot incapacitation poses no threat to safety in air operations and therefore there is no justification for the FAA "no exemptions" policy regarding the Age 60 rule. Petitioners claim two systems that prevent accidents when there is an incapacitation are the manual lock

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[1] *See* Petition at 35.

shoulder harness and the two-communication rule. According to petitioners, even though pilots have died on the job, not a single air carrier accident has been reported in the literature as caused by pilot incapacitation since the two-communication rule and the manual lock shoulder harness were adopted by industry in the early 1970s. Petitioners also cited studies which compute the risk of pilot cardiovascular failure at 1 in 20.8 million flight hours and a risk of accident in multiple crew air carrier flight operations to be 1 in 8.3 billion flight hours. Petitioners allege the FAA has ignored this factual record which proves that pilot incapacitation in air carrier operations poses no risk to safety.

Petitioners allege when the FAA considers granting exemptions to the Age 60 rule, it does not consider that performance and medical checks eliminate at-risk pilots. Petitioners claim one such performance check is the multiple crew system where a back-up pilot can fly the aircraft if a PIC becomes incapacitated. Petitioners contend the FAA recognized the effectiveness of multiple or back-up pilots in airline operations during congressional testimony and in a 1969 study co-authored by former Federal Air Surgeon P.V. Siegel.

In addition, petitioners claim the FAA has never denied its ability to diagnose illness in older individuals and to be able to identify pilots that are unfit for duty. Petitioners claim the FAA has also recognized the superior health and fitness of airline pilots as compared to the general U.S. population.

Petitioners also assert that the FAA did not enforce the Age 60 rule against foreign pilots flying into the United States until 15 years after the International Civil Aviation Organization adopted the Age 60 rule. Petitioners claim the granting of these waivers is additional evidence of the FAA's true purpose of the Age 60 rule, airline scheduling and economics.

Petitioners also claim that because the Age 60 rule has no safety basis, the rule is inherently discriminatory and, therefore, violates the Age Discrimination in Employment Act (ADEA). Petitioners claim this argument is distinct from past claims of age discrimination because past claims did not argue the rule has no safety basis, past claims argued even if the rule was based on safety, it violated the ADEA.

Petitioners claim the FAA's rigid enforcement of the Age 60 rule forces airlines to aggressively recruit military pilots, thus creating a shortage of military pilots. Relaxing the FAA's no-exemptions policy will help the military retain combat-ready pilots, which is a priority, particularly in times of national emergency.

On September 10, 2002, the FAA published a summary of the petition in the Federal Register seeking public comment for a period of 2 weeks. On October 2, 2002, a more detailed summary of the petition was published in the Federal Register and the comment period was extended to October 14, 2002. The FAA also received correspondence from Mr. Bothwell concerning a number of administrative matters, including a dispute as to the second summary of the petition published on October 2, 2002. Mr. Bothwell was concerned that the summary of the petition that he provided was not published in the Federal Register.

The second summary of the petition published in the Federal Register on October 2, 2002, more accurately described the petition than the summary Mr. Bothwell provided. The published summary paraphrased and quoted from the petition that Mr. Bothwell filed. Mr. Bothwell has not demonstrated how not using his summary has in any way affected public notice of the petition. In addition, the entire petition filed, along with every comment submitted, has been and is available to the public online. The Web address for the online version of the petition was included

in both notices in the Federal Register. The FAA received over 6,700 comments. Finally, the FAA is not required to publish the summary of a petition for exemption submitted by a petitioner or his or her representative, pursuant to 14 C.F.R. § 11.81(f). Mr. Bothwell's summary of the petition was conclusory and it was the FAA's position that publishing his summary could have misled the public to believe the FAA was admitting to the allegations in the petition.

Summary of Comments:

The overwhelming majority of commenters favor retaining the current Age 60 rule. Safety and medical issues were most often cited as the reasons for retention of the current rule. Numerous commenters stated there is medical information to support the Age 60 rule and before any change is considered, there needs to be extensive medical study in this area to prove that a change is warranted. Safety concerns of commenters included concern over irregular hours and long hours that take a toll on any pilot and many younger pilots and check airman stated they observed fatigue and a deterioration of mental skills and snap judgment in pilots close to age 60. In addition, some commenters stated since safety is the paramount consideration and the public does not choose which pilot flies their aircraft, the FAA should keep the Age 60 rule for the benefit of the general public. Some commenters advised that many pilots encounter serious medical problems soon after retirement due to airline pilot job stresses and evidence of this is in the sick leave records of flight engineers over the age of 60.

The vast majority of comments received for this petition for exemption did not address the medical condition of these ten petitioners. Instead they commented on whether the FAA should keep, remove, or withdraw the Age 60 rule. Comments were solicited to provide the public an

opportunity to comment on the petition and to receive information as to whether these ten individual petitioners should be granted an exemption from 14 CFR § 121.383(c).

Many commenters stated they either support or oppose the FAA granting of an exemption to the ten petitioners. However, few commenters provided specific substantive information concerning the ten petitioners to assist the FAA in deciding if these ten petitioners should be granted an exemption to the Age 60 rule.

Many commenters stated changing the rule to bring back older pilots would not make economic sense given the financial troubles of airlines. Some commenters stated the public is focused on the safety of flight after the events of September 11, 2001, and permitting older pilots to fly in Part 121 operations would give the public one less reason to fly. Many commenters stated changing the Age 60 rule would disrupt the retirement plans of many airline pilots that are based on the age of 60.

Many commenters do not believe the Age 60 rule is discriminatory, they believe safety overrides any discrimination. Some commenters also pointed out that there are minimum age requirements to become an airline pilot and that the FAA must choose some retirement age and age 60 is as good as any other.

A vast number of pilots commented that there is no shortage of pilots given that many thousands of pilots have been furloughed since the events of September 11, 2001. Many furloughed pilots pleaded that the FAA not change the Age 60 rule, because increasing the age above 60 would delay any chance they have at getting back their airline pilot job.

Many commenters stated that the vast majority of pilots and airlines are in favor of the Age 60 rule. Commenters also

stated that petitions such as the one considered here originate from a vocal minority within the pilot community that understood the retirement system when they were hired by an airline but failed to plan their retirement accordingly and now seek to change the rule for the minority's financial gain, not for safety.

Commenters that support changing the Age 60 rule most often cited economics as the basis for the Age 60 rule. Some commenters stated the Age 60 rule is based on economics as a favor to the airlines, terminating the most senior and expensive pilot salaries. Some commenters stated they or pilots they know are experiencing financial difficulty because of the rule and they should be able to work as a pilot in Part 121 operations to the traditional social security retirement age of 65.

Commenters stated airline flights are less safe without older pilots because older pilots are more experienced and are sharper than younger, less safe pilots. Also, some commenters argue medical checks can weed out unsafe pilots. Finally, some commenters stated safety cannot be the basis of the rule because many other countries permit airline pilots to fly beyond age 60.

Some commenters argued the Age 60 rule is age discrimination. Some commenters stated the Age 60 rule violates U.S. age discrimination laws and it is ironic that the Government that adopts age discrimination laws also practices such discrimination.

Some commenters who are pilots argued that the Age 60 rule should be abolished because there is currently a shortage of pilots in the airline industry, including a shortage of pilots in certain regions.

The Southwest Airlines Pilots' Association (SWAPA) commented that the petition for exemption should be granted because the Age 60 rule is discriminatory and refuted by medical research. SWAPA also commented that there is no credible evidence to support the Age 60 rule and physicals and simulator checks are adequate to screen at-risk pilots.

The Air Line Pilots Association, International (ALPA) commented that the petition should be summarily denied because the petition does not meet the requirements the FAA adopted in the 1995 Disposition of Comments. ALPA commented that the Age 60 rule has been thoroughly studied, and repeatedly reaffirmed by the FAA and Federal Courts of Appeals. ALPA also commented that the petition offers no basis for reconsidering the Age rule, that each point in the petition has been addressed and rejected on repeated occasions. In regard to the origin of the Age 60 rule, ALPA commented that the FAA has reviewed the rule three times, finding each time the rule is well-founded, and the FAA's findings were upheld each time by a Federal Court of Appeals. ALPA commented that the petition offers no evidence to support the claim that the Age 60 rule is maintained as a favor to airline executives. ALPA commented that the FAA has devoted a substantial amount of time and resources to the Age 60 rule, and the FAA has conducted a significant amount of research concerning the Age 60 rule. ALPA commented that there is no evidence that authors of accident studies intentionally skewed results to support the Age 60 rule and that two appellate courts rejected criticisms of FAA use of the Golaszewski study. ALPA commented that the petition's allegation that the 1981 National Institute on Aging Panel Report disproved the medical justification is not true, the report recommended retaining the Age 60 rule and extending the rule to Part 135 operations. ALPA commented that sudden pilot incapacitation and subtle cognitive impairment are topics

the FAA have found to be a safety risk and ALPA agrees with the agency's conclusions. Also, ALPA stated that performance and medical checks do not adequately screen at-risk pilots as the petition argues. ALPA commented that the FAA found that the Age 60 rule does not violate the Age Discrimination in Employment Act and the United States Court of Appeals for the District of Columbia Circuit upheld that decision. ALPA also commented that there currently is no shortage of pilots for Part 121 operations, in fact as of September 30, 2002, 5,000 pilots represented by ALPA were furloughed.

The Professional Pilots Federation commented that the origin of the Age 60 rule stems from ex parte contacts between a former administrator and an airline chief executive officer. They state there is no independent study that they are aware of that states some retirement age is necessary.

Wright State University commented that more than three dozen countries allow airline pilots to fly past Age 60, which they state contributes to air safety. The university also states that life expectancy in the United States has increased since the rule was enacted and, therefore, the public and pilots are living longer.

The Federal Education Association, Inc. commented that it could see no basis for requiring retirement at the age of 60. It also commented that pilots over the age of 60 are permitted to fly into the U.S. while United States pilots cannot.

The American Association of Retired Persons commented that the FAA continues to adhere to a rule that was adopted in 1959 to insure the highest level of safety despite over 40 years of medical and technological developments and a growing trend among foreign aviation authorities to allow pilots over age 60 to fly. It also commented that the FAA

has yet to attempt to obtain medical or performance data on older pilots while claiming such data is needed before any change to the rule can be considered.

Finally, hundreds of commenters just simply stated they are for or against a change to the rule, with no explanation of why the rule should remain or be changed.

A brief history of the Age 60 rule:

The "Age 60 Rule" was adopted by the FAA in 1959 (24 FR 9767, December 5, 1959). The history and basis of the rule are set out in detail in a Disposition of comments and notice of agency decisions, 60 FR 65977 (December 20, 1995), corrected, 61 FR 24533 (May 15, 1996). Since adoption, the basis of the rule has been upheld in at least three cases, *see* PPF v. FAA, 118 F.3d 758 (D.C. Cir. 1997); O'Donnel v. Shaffer, 491 F.2d 59 (D.C. Cir. 1974); Air Line Pilots Association International v. Quesada, 276 F.2d 892 (2nd Cir. 1960); and exemption petitions have been unsuccessful in at least eight cases, *see* Yetman v. Garvey, 261 F.3d 664 (7th Cir. 2001); PPF v. FAA, 118 F.3d 758 (D.C. Cir. 1997); Baker v. FAA, 917 F.2d 318 (7th Cir. 1990); Aman v. FAA, 856 F.2d 946 (7th Cir. 1988); Gray v. FAA, 594 F.2d 793 (10th Cir. 1979); Rombough v. FAA, 594 F.2d 893 (2nd Cir. 1979); Keating v. FAA, 610 F.2d 611 (9th Cir. 1979); Starr v. FAA, 589 F.2d 307 (7th Cir. 1978).

Congress has also had the opportunity to reevaluate the Age 60 rule during the past 43 years. For example, in February of 2001, a bill to increase the Age 60 rule to age 65 was referred to the House Subcommittee on Aviation.[2] In March of 2001, a bill to increase the Age 60 rule to age 63 was drafted to be reported by the Senate Committee on Commerce, Science, and Transportation.[3] Neither of those two bills was enacted.

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[2] *See* H.R. 448, 107th Congress.

[3] *See* S.361, 107th Congress.

In a 1997 appropriations bill, the National Transportation Safety Board was appropriated a specific sum of money to conduct a study of the Age 60 rule. When the bill was finally passed by Congress, however, an amendment was added prohibiting the NTSB from spending any appropriated money to study the rule.[4]

Also, in the 1995 Disposition of comments, the FAA decided to deny future Age 60 rule petitions for exemptions without first publishing the petition for comment if the petition does not contain a proposed technique to assess an individual pilot's abilities and risks of subtle and sudden incapacitation.[5] This process was upheld by the United States Court of Appeals for the District of Columbia Circuit.[6]

While the current petition does not contain a new proposed technique to assess an individual pilot's ability and risk of incapacitation, the petition presents a unique, albeit not new, challenge to the Age 60 rule, in the form of a petition for exemption, on which the FAA gave the public an opportunity to comment.

Petition for Exemption Standards:

Factors that the FAA considers when evaluating a petition for exemption include whether the petitioner can show why granting the exemption will be in the public interest, how the exemption would benefit the public as a whole, and why granting the exemption will not adversely affect safety, or

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[4] *See* Department of Transportation and Related Agencies Appropriations Bill, p177, Report 104-631, June 19, 1997; Department of Transportation and Related Agencies Appropriations Bill, p179, Report 104-325, July 19, 1996.

[5] *See* 60 FR 65980.

[6] *See* Yetman v. Garvey, 261 F.3d 664, 679 (7th Cir. 2001).

how the exemption will provide a level of safety at least equal to that provided by the rule from which the petitioner seeks an exemption.[7] Moreover, Congress specified in subpart III of Part A to Subtitle VII to Title 49 of the U.S. Code that the Administrator may grant exemptions from FAA regulations if such exemptions are in the "public interest." *See* 49 U.S.C. § 44701(f). In setting forth criteria for the Administrator to carry out her duties under Subpart III of Part A to Subtitle VII of Title 49 of the U.S. Code, Congress required the consideration of several things to be in the "public interest." 49 U.S.C. § 40101(d). But of the several items listed for consideration of what the public interest is in any particular matter, Congress stated that "(1) assigning, maintaining, and enhancing safety and security [are]..the highest priorities in air commerce." 49 U.S.C. § 40101(d)(1).

Thus, although there may be many things that are arguably in the "public interest," the Administrator is statutorily required to consider in any rulemaking action (including petitions for exemption from rules) the highest priority in air commerce is to assign, maintain, and enhance safety and security.

Petitioners have not met the standards for an exemption to the Age 60 rule under 49 U.S.C. §§ 40101(d)(1) and 44701(f) and 14 CFR § 11.81(d) and (e). Petitioners attack the basis of the rule instead of providing medical evidence as to each airman, scientific studies, or new scientific protocols that would justify an exemption. As the United States Court of Appeals for the Seventh Circuit stated in a case involving a petition for exemption, that included many of the same allegations attacking the Age 60 rule, the validity of the Age

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[7] *See* 14 C.F.R. § 11.81(d) and 11.81(e).

60 Rule has already been affirmed.[8] In a petition for exemption, the petitioners bear the burden of showing that circumstances justify exemptions from the Age 60 rule, a heavy burden where daunting issues of public safety are implicated.[9]

Petitioners fail to present any facts that would justify an exemption to the Age 60 rule for these ten individuals. The only facts given concerning these petitioners are their names, birth dates, and addresses. Petitioners present no facts that uniquely qualify them for an exemption to the Age 60 rule as opposed to many similarly situated pilots. Without further medical information regarding these petitioners and without a medical protocol that can reliably predict which over age 60 pilot will experience detrimental age decrements, the petitioners have failed to present any evidence upon which an exemption might legitimately be based.

Instead of presenting information that would support an exemption from the rule, the petitioners challenge the basis of the Age 60 rule and the FAA's conduct in defending the rule. Such allegations do not meet the requirements for a petition for exemption. These allegations do not meet the requirements for a petition for rulemaking. The FAA is responding to the specious allegations petitioners raise regarding the FAA's conduct over the past 43 years defending the Age 60 rule.

The petition is denied because the petitioners failed to provide any information that supports an exemption from the rule.

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[8] Yetman, at 668-669; *See also,* ALPA v. Quesda, 276 F.2d 892, 898. The rule was first upheld when the Air Line Pilots Association claimed Administrator Quesada had no reasonable basis for exercising his judgment, the court held there is considerable support for the Administrator's action. *See id.*

[9] *Id.* at 669.

FAA Response to Petitioners Allegations:

Petitioners allege that the agency has participated in an economic conspiracy to justify the Age 60 rule. These allegations are without merit. The allegations petitioners present in this petition for exemption are not factually based; instead they are based on far-reaching theories, and are completely without merit. The petitioners present no significant new information that has not been presented in prior petitions for exemptions or petitions for rulemakings. In each proceeding, where these same arguments were raised, the FAA denied the petition and various U.S. Courts of Appeals upheld the FAA's denials. The Age 60 rule and the justifications for the rule have been subjected to repeated FAA review and judicial review over the entire 43-year history of the rule. Congress has had the opportunity to revisit the Age 60 rule. In addition, the FAA, other Federal agencies, and private institutions have conducted numerous studies to examine the Age 60 rule.

Allegations of favoritism in the adoption of the Age 60 rule were raised in earlier proceedings before the FAA and challenges to FAA determinations in three cases before two United States Courts of Appeal.[10] The basis of this assertion is a letter from C.R. Smith, president of American Airlines when the Age 60 rule was adopted in 1959, to Administrator Elwood Quesada, suggesting there must be some suitable

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[10] *See* Brief of Petitioners, page 23, United States Court of Appeals for the Seventh Circuit, Yetman v. Garvey, February 20, 2001. (Yetman Brief); Brief for Petitioners, page 4, United States Court of Appeals for the District of Columbia Circuit, Professional Pilots Federation, et. al., May 22, 1996. (PPF Brief); In the matter of Professional Pilots Federation, Jerry J. Fielding, and James C. Rosater, Petition for Writ of Mandamus, pages 7-8, United States Court of Appeals for the Seventh Circuit, November 25, 1994 (PPF Writ of Mandamus); Yetman Petition for Exemption, Docket no. FAA 2000-8016, p52-53 (Yetman petition); Comments of the Professional Pilots Federation on Proposed Rulemaking as it Relates to Age Limitations for Pilots, pages 2-3, Docket no. FAA-1995-28154-1531; Comment of Bert M. Yetman, Docket no. FAA-1995-27264.

age for mandatory airline pilot retirement.[11] This and other documents purportedly supporting this allegation have been submitted to the FAA and to U.S. Courts of Appeals in at least two different petitions for exemption from the age 60 rule.[12] In response, the FAA denied allegations of favoritism[13] and U.S. Courts of Appeals have refused to reconsider the validity of the Age 60 rule, upholding the rule in several cases for over 40 years.[14]

The FAA denies allegations of favoritism in regard to either the adoption of the Age 60 rule in 1959 or during its longstanding defense of the rule. At the time the rule was adopted, the FAA followed standard rulemaking procedures by giving the public an opportunity to comment on the proposed rule. Claims by petitioners that the Age 60 rule was adopted as a personal favor to the president of an airline company are completely without merit.

There was nothing inappropriate in adopting the Age 60 rule as an operational restriction under section 601 of the 1958 Act as opposed to an airman certification provision under section 602 of the Act. There are many operational

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[11] *See* Petition for Exemption, Dallas Butler et. al., Exhibit C, docket number FAA-2002-12501-1

[12] *See* Yetman Brief Joint Appendix 87, 88; PPF Brief Joint Appendix 618.

[13] *See* Disposition of comments and notice of agency decisions, 60 FR 65984.

[14] *See* Yetman v. Garvey, 261 F.3d 664, 668-9 (7th Cir. 2001) stating the court is not reexamining the validity of the Age 60 Rule, as it was already affirmed in Starr v. FAA; PPF v. FAA, 118 F.3d 758, 770 finding the FAA's decision not to convene rulemaking to revise the Age 60 rule was not arbitrary and capricious; Aman v. FAA, 856 F.2d 946, 954 (7th Cir. 1988) stating that petitioners have not produced sufficient evidence of ex parte communications to meet the heavy burden required to overturn an agency action; Starr v. FAA, 589 F.2d 307, 309 (7th Cir. 1978) stating the court will not reexamine the validity of the Age 60 rule, as the rule has already been affirmed; O'Donnel v. Shaffer, 491 F.2d 59, 62-63 (D.C. cir. 1974); ALPA v. Quesada, 276 F.2d 892, 898 (2nd Cir. 1960).

restrictions and requirements in part 121 that do not have a corresponding airman certification provision. That is because the level of safety required for part 121 operators is higher than other operations, and, thus, the tolerance for risk is lower. Although pilots who are 60 years of age or older may operate under other parts of the regulations (e.g. parts 91 and 135) such operations do not have to meet the more demanding safety requirements imposed on part 121 operators. The Age 60 rule was adopted as an operational rule because Age 60 carves out a limited restriction prohibiting airman from operating aircraft under part 121. An airman certification restriction would be an overly broad measure for this rule and would require revoking and reissuing an airman's certificate at age 60, a matter that is more appropriately handled as an operational restriction.

The petitioners' allegations that the FAA has refused to collect data concerning the Age 60 rule is simply untrue. In addition, the FAA does not restrict the type of data it collects concerning the Age 60 rule. The FAA collects data neutrally, regardless of whether some claim certain data may support or undermine this rule. In the latest petition for exemption before the U.S. Court of Appeals for the Seventh Circuit, the court found "We find the FAA, in accordance with our directive [from a prior petition for exemption] has kept abreast of and considered new studies and medical technology."[15]

In fact, the FAA has posted four reports concerning Age 60 on its website, at the address: http://www.cami.jccbi.gov/aam-400A/AGC60/60_index.html. These reports were created in part in response to the U.S. Senate Committee on Appropriations order to study the Age 60 rule in a year 2000 appropriations bill. The first report is an extensive annotated bibliography of the Age 60 rule debate covering the years 1990 to 1999. The second report is a re-analysis of a

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[15] Yetman v. Garvey, 261 F.3d at 678.

1999 Chicago Tribune Report that analyzed accident and incidents data from 1990 to 1999. The third report is an analysis of professional air transport pilot accident rates by age for the years 1988 to 1997. The fourth report is an analysis of professional ATP and commercial pilot accident rates by age for the years 1988 to 1997. Petitioners criticize the method of analysis used in the fourth report, however, the FAA conducted the study pursuant to the direction of the Appropriations Committee and the results of that study showed an increasing risk for pilots over the age of 60.

Petitioners also claim that the FAA intentionally misrepresented information concerning studies (including the Flight Time Study) that support the Age 60, this allegation is completely false. This same argument has been raised in a petition for exemption[16] and raised in two challenges of FAA exemption denials before the U.S. Court of Appeals for the Seventh Circuit.[17] In both cases, the Seventh Circuit recognized that the Flight Time Study was not perfect, but ultimately upheld the FAA's decision to deny petitions for exemption and upheld the use of the

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[16] *See* Yetman Petition for Exemption, Docket No. FAA-2000-8016 at page 3, stating "the FAA has pursued a course of deception for many years in order to retain a rule that cannot be justified medically or operationally. As one example, FAA sought to deceive the Court in Baker v. FAA, 917 F.2d 3 18 (7th Cir. 1990), by claiming in that litigation that the "Flight Time Study" justified the denial of exemptions, when it knew at that time that the study was hopelessly flawed and did not support any conclusion. Under recognized standards of administrative law, the exemptions should be granted." *See also Id.* at 40.

[17] *See* Yetman Brief for Petitioners pages 31, 32 stating "...FAA's Kenneth Chin has revealed that FAA knew from the start that the Flight Time Study had 'major data deficiencies' and could not be used 'to support any position' (J.A. 15), proving that it had been foisted upon the Court in a duplicitous agency effort to conceal its fatal defects (see J.A. 15, 359)."; Baker Brief for Petitioners pages 9-17 stating the FAA's reliance on the Flight Time Study to support the Age 60 rule is fatally flawed, and if the flaw is removed from the study, the study supports granting a petition for exemption.

Flight Time Study as substantial evidence supporting the validity of the Age 60 rule.[18]

In the latest case upholding of an FAA petition for exemption denial the court states:

> Petitioners have failed to explain how the *FAA's awareness* of the deficiencies in the Flight Time Study—incidentally, a fact that we were aware of in *Baker*—impacts our substantial evidence inquiry. Yetman at 677 (emphasis in original).

The issue of whether pilot incapacitation poses a risk to air carrier safely has also been repeatedly raised by petitioners[19] and examined by the FAA in prior petitions.[20] In prior petitions concerning Age 60, the FAA determined that both sudden and subtle incapacitation create risks to air safety and experience of older pilots do not compensate for lost faculties. Recently, the court in Yetman agreed with the FAA, finding that the petitioners in that case did not provide, as was their burden, strong evidence that the added experience of pilots 60 and over clearly neutralizes the danger of sudden incapacitation and deterioration of piloting skills associated with the aging process.[21] Petitioners evidence in the present petition is no less than a decade old, once again providing no new evidence to support their claims and certainly not meeting the standard described by the court in Yetman, as requiring strong evidence to support their claims.

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[18] *See* Yetman, 261 F.3d at 676, 677; Baker, 917 F.2d at 322.

[19] *See* Yetman petition for exemption pp 19, 27 (65 FR 59496); PPF petition for rulemaking p13 (58 FR 46585).

[20] *See* Yetman denial pp 8-9, 19-20; PPF denial 60 FR 65983.

[21] *See* Yetman at 678.

The purpose of requiring safety systems and procedures such as multiple pilot crews and the Age 60 rule is to provide redundant safety measures, so that if one safety mechanism fails another is in place. However, some risk exists even with what appear to be redundant safety mechanisms. Thus, although part 121 operations require the presence of at least two pilots, the safety benefit of having two pilots would be diminished if one of those pilots were age 60 or older. That's because there is a higher chance that the age 60 or older pilot will suffer an incapacitating event, including an insidious incapacitating event (not noticeable to other crewmembers) or might have a decrement in cognitive functioning or reaction times that would not be timely caught and corrected by the other pilot.

The petitioners claim that the FAA does not consider performance and medical checks to eliminate at-risk pilots when examining a petition for exemption. This claim is without merit. The FAA considered medical testing in recent petitions and found that the medical tests and protocols did not provide the same level of safety as the Age 60 rule and this finding was upheld by court decisions.[22] For instance, the Yetman petition for exemption proposed a medical protocol, albeit a protocol substantially similar to past protocols submitted to the FAA, that in the petitioners view could identify pilots medically qualified to operate airline pilot duties beyond age 60.[23] In a detailed analysis of petitioner's protocol, the FAA found the protocol did not provide a level of safety equal to the level of safety under the Age 60 rule.[24] In addition, the FAA found there continues to be cognitive disorders for which there are no diagnostic tools on which we can rely. Similarly, the FAA

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[22] *See* Yetman at 675-6; Yetman denial p17-18; Aman at 954; Aman denial p13;

[23] *See* Yetman petition p2.

[24] *See* Yetman denial p18.

found the medical protocol submitted in the Aman and Baker petitions to be inadequate.[25] The courts in each case upheld the FAA decision.[26]

In the current petition, no medical protocol whatsoever was submitted; instead petitioners claim the FAA can diagnose and eliminate at-risk pilots through current first-class airmen medical examinations. However, the FAA and courts have held that first-class airmen medical examinations and any medical protocol so far submitted to the FAA are inadequate to screen at-risk-pilots and do not provide the same level of safety as the Age 60 rule. The courts have already spoken as to the FAA's analysis of protocols and the courts disagree with the petitioners.[27]

Petitioners claim that use of simulators can screen at-risk pilots has also been raised in recent petitions for exemption[28] and addressed by the FAA in denying those petitions.[29] As discussed in the FAA's denial of the Yetman petition:

> ...periodic proficiency and competency checks are intended to detect a pilot's performance deficiency and to correct those deficiencies before the pilot is returned to flight operations. These checks only verify the state of a pilot's performance at the time of the checks. They are not useful for detection of early or subclinical cognitive defects that may subtly degrade performance or which, in time, may progress to risks for

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[25] *See* Aman denial p13; Baker denial p32.

[26] *See* Yetman at 675-6;Aman at 954

[27] *See id.*

[28] *See* Yetman petition at pp 2, 22, 29; Aman petition at pp 3, 31-32.

[29] See Yetman denial at p20; Aman denial at p13-14.

> errors in judgment or other actions that may jeopardize safety. The checks do not predict whether an individual pilot's performance will degrade at any time in the future with aging.

Yetman denial p20.

The FAA made the same finding in the 1995 Disposition of Comments[30] and the U.S. Courts of Appeals for the District of Columbia Circuit upheld the FAA's determination:

> We conclude that the FAA afforded adequate consideration to the alternative of individualized testing. The FAA explained that even state-of-the-art testing cannot screen out potentially risky pilots.

PPF v. FAA 118 F.3d at 674.

Nothing has been presented to the FAA in this petition which warrants the FAA altering its determination with regard to the use of simulators to screen at-risk pilots; simulators are a beneficial tool for testing a person's present piloting ability and identifying any current deficiencies in that person's piloting skills. However, the FAA found no evidence that simulators are an adequate screen to identify future pilot deficiencies including subtle insidious cognitive deterioration. Therefore, the use of a simulator as a medical screen would not be a thoroughly effective tool to identify current medical problems with an airman and would not be an effective tool to predict which older pilots will shortly manifest medical problems in flight. There is no dispute that older people have higher incidences of medical problems in general and higher incidences of insidious/subtle cognitive deficits than younger people.

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[30] *See* 1995 Disposition of Comments at 60 FR 65983-65984.

Petitioners also claim the FAA did not enforce the Age 60 rule against foreign pilots flying into the United States; however, under FAA regulations there is no Age 60 rule in Part 129, the part that governs operations of foreign air carriers and foreign operators of U.S. registered aircraft. While the ICAO standard was not enforced at its inception, the policy at the time recognized the international ramifications of insisting on compliance with international operating requirements. In any event, the United States worked through the difficult complexities and has for quite some time now insisted on Age 60 compliance by part 129 operators of "large" aircraft in the United States.

Petitioners once again raise a claim that the Age 60 rule violates the ADEA, even though the FAA has successfully defended the rule on that basis twice, having one U.S. Courts of Appeals hold that the ADEA does not apply to the FAA and another court recognize that holding.[31] Petitioners attempt to distinguish this claim from past claims by arguing that the Age 60 rule has no safety basis and therefore is inherently discriminatory. That claim is inconsistent with case law and findings made in cases where

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[31] *See* PPF denial at 60 FR at 65985 stating "The FAA agrees that limitations based on age are to be avoided if possible. However, safety in air transportation is paramount. As discussed above, the FAA has not found a way to acceptably evaluate the inevitable deterioration that occurs with age. Considering that the consequences of a pilot's subtle or sudden incapacitation potentially are so severe, the FAA has determined that at this time safety requires the Age 60 Rule to remain unchanged."; Yetman denial at p27 stating "While the ADEA does not apply to the FAA's regulation of pilots, PPF, 118 F.3rd at 770, the FAA does take cognizance that no group of people should be treated differently than others unless there is a valid reason for doing so. As discussed above, the FAA has determined that there are important safety considerations that lead the FAA to denying the petition for exemption."; PPF v. FAA at 762-763; Yetman v. FAA at 668, FN1, recognizing the PPF decision finding the ADEA does not apply to the FAA.

the PPF itself was a party.[32] As case law holds, the ADEA does not apply to the Age 60 rule. Congress has had the opportunity to revisit both the Age 60 dispute and the ADEA after these significant decisions. Congress has not seen fit to amend the ADEA in any way that would nullify the FAA's Age 60 rule.

Finally, petitioners claim that currently, there is a pilot shortage, which may affect the war against terrorism because military pilots are leaving the military to join airline companies, is not true. Currently there is no shortage of airline pilots, in fact, airlines are furloughing thousands of pilots in response to the economic and travel industry slump since the events of September 11, 2001. Evidence of these furloughs lies in the number of airline pilots who commented on this petition stating they did not want the Age 60 rule to be changed because they and many of their colleagues are furloughed. Thousands of furloughed pilots submitted comments of this nature. In addition, the Air Line Pilots Association (ALPA) comment to this docket stated that 5,000 of the 65,000 pilots represented by ALPA are on furlough.[33]

In addition, as in past petitions that raise this same argument, the FAA notes that changing the Age 60 rule would not have an impact on the number of pilots leaving military service or the number of pilots in the airline industry.

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[32] We note that while the PPF is not listed on the petition for exemption the FAA received on June 13, 2002, the petition is located on the PPF website with PPF letterhead and the attorney representing these ten petitioners signs his correspondence with the FAA as "Attorney for the Professional Pilots Federation."

[33] *See* Comments of the Air Line Pilots Association, International, p18-19, docket no. FAA-2002-12501-6622.

In consideration of the foregoing, I find that a grant of exemption would not be in the public interest. Therefore, pursuant to the authority contained in 49 U.S.C. §§ 40113 and 44701, delegated to me by the Administrator, the petition of Butler, Dallas E. et al for an exemption from 14 CFR § 121.383(c) is hereby denied.

Issued in Washington, DC, on October 6, 2003

/s/
John M. Allen
Acting Director
Flight Standards Service

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 03-1386 September Term, 2004

Dallas E. Butler, et al.,
Petitioners

v.

Federal Aviation Administration,
Respondent

BEFORE: Ginsburg, Chief Judge, and Edwards, Sentelle, Henderson, Randolph, Rogers, Tatel, Garland, and Roberts, Circuit Judges

ORDER

[ENTERED: DECEMBER 14, 2004]

Upon consideration of petitioners' petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Michael C. McGrail
Deputy Clerk

RECORD NO. 03-1386

CASE DECIDED WITHOUT ORAL ARGUMENT
PURSUANT TO CIRCUIT RULE 34(j)

In The
United States Court of Appeals
For The District of Columbia Circuit

DALLAS E. BUTLER, *et al.*,

Petitioners,

v.

FEDERAL AVIATION ADMINISTRATION,

Respondent.

ON PETITION FOR REVIEW FROM THE
FEDERAL AVIATION ADMINISTRATION

PETITIONERS DALLAS E. BUTLER *et al.* AMENDED PETITION FOR REHEARING WITH PETITION FOR REHEARING EN BANC

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Dated: November 18, 2004

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CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

CERTIFICATE OF COUNSEL
REQUIRED BY D.C. CIR. RULE 28(a)(1)

(A) PARTIES AND AMICI

The 12 parties who petitioned the Federal Aviation Administration, and who petition for rehearing and rehearing en banc, are:

Dallas E. Butler
Tom Gamble
Jeannie C. de Lamos
Paul Turner III
Alan J. De Sa
Arthur B. Ward
Woodrow M. Hassinger
Rudy Mack, Sr.
Joe R. McCabe
Philip N. Nash
Michael L. Oksner
William M. Siegel

The Southwest Airlines Pilots Association (SWAPA) filed an *amicus curiae* brief in support of the pilots' petition for review. No intervenors or other amici are identified in this matter.

(B) RULINGS UNDER REVIEW

The judgment of the panel, upon which rehearing and rehearing en banc is petitioned, was issued by this Court September 24, 2004.

The ruling at issue in this Court is an Order by John M. Allen, Acting Director, Flight Standards Service, Federal

Aviation Administration, United States Department of Transportation, Docket No. FAA-2002-12501-6781, issued on October 9, 2003.

A copy of that Order is attached to the Petition for Review of Agency Order that the petitioners here filed October 30, 2003.

The Order was announced in Summary Notice No. PE-2003-74, at 68 Fed. Reg. 69761, 69764 (Dec. 15, 2003).

(C) RELATED CASES

The case under review was not previously before this Court or any other court. No other related cases are currently pending in this Court or any other court of which counsel is aware.

/s/ Anthony P. X. Bothwell

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STATEMENT OF GROUNDS FOR REHEARING AND REHEARING EN BANC

Pursuant to Circuit Rule 35(b), Petitioners Dallas E. Butler et al. ("the pilots") state that rehearing and rehearing en banc is necessary as to the decision in this case, Dallas E. Butler et al. v. Federal Aviation Administration, No. 03-1386 (D.C. Cir., Sept. 24, 2004), for the following reasons:

1. to secure and maintain uniformity with applicable Supreme Court and circuit authority which mandates that when an agency's reliance on and dissemination of questionable data is harmful, those harmed are entitled to their day in court (Tozzi v. U.S. Dept. of Health and Human Services, 271 F.3d 301, 307 (D.C. Cir. 2001)); that persons harmed by agency action have a right of judicial review (Abbott Laboratories v. Gardner, 387 U.S. 136, 140 (1967)); and that no judicial deference is owed to FAA's authority when the government's own data suggests the contrary (U.S. Air Tour Ass'n v. FAA, 298 F.3d. 997, 1018 (D.C. Cir. 2002).

2. to address and resolve three questions of exceptional importance,

a. whether the FAA's reliance on concededly false age-safety data in its denial of the pilots' request for exemptions violated mandatory standards established in the Information Quality Act of 2000 (section 515 of the Treasury and General Government Appropriations Act for Fiscal Year 2001 (Pub. L. No. 106-554; H.R. 5658) and guidelines pursuant thereto (Office of Management and Budget, Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies; Republication; 67 Fed. Reg. 5365 et seq., Feb. 5, 2002), in defiance of the rule that, so long as a federal regulation is

extant, the Executive Branch is bound by it (U.S. v. Nixon, 418 U.S. 683, 695 (1974)),

b. even if the Information Quality Act standards are deemed to be not binding, whether the FAA's denial under its no-exemptions policy failed to meet the "substantial evidence" test according to judicially manageable standards (Steenholdt v. F.A.A., 314 F.3d 633, 638 (D.C. Cir. 2003), Lincoln v. Vigil, 508 U.S. 182, 193 (1993), Padula v. Webster, 822 F.2d 97, 100 (D.C. Cir. 1987)), where FAA officials conceded the policy had no safety basis and was intended as a form of economic favoritism, and

c. whether the FAA's claim of a medical/safety justification for its decades-long refusal to grant even a single exemption from 14 C.F.R. § 121.383(c) ("the age 60 rule"), now is ripe for adjudication.

ARGUMENT

This case involves 12 pilots who submitted to the Federal Aviation Administration a petition (pet.) for exemption from 14 C.F.R. § 121.383(c) ("the age 60 rule"), a regulation that bars pilots from flying commercial airliners after age 59.

The record shows that the FAA has followed a policy of automatic denial of all such requests for exemption. The record also shows that this policy never had any safety purpose, and that its only purpose has been supposed economic favoritism for certain interests in the airline industry.

In its Response to Petitioners Allegations (at 9-15)(J.A. 191-197), the FAA gratuitously denied the pilots' charges of FAA favoritism and misrepresentation. The agency did not challenge the accuracy, relevance or

admissibility of the evidence presented by petitioners. Undisputed evidence established that the agency intentionally misrepresented both the purpose of its no-exemptions policy and the data that supposedly justified it. The agency, holding all the records of medical fitness and safety performance of the 12 petitioners, never denied the petition's averments that these pilots have unblemished fitness and performance records and are among the safest, ablest pilots in the industry. Where no medical/safety issues govern, the medical/safety testing protocols demanded by the agency become irrelevant.

This is the first case involving the age 60 rule in which the FAA's conduct and culpability are central to the plea. This is the first case in which a broad array of evidence - FAA internal documents, previously secret, as well as extensive publicly available information - on the entire history of the agency's no-exemptions age 60 policy has been proffered in support exemptions. The agency's failure to rebut the evidence seals the proof of the pilots' case.

It remains undisputed that (a) these pilots, ages 57 to 67, have unblemished safety performance and medical records; (b) top FAA officials conceded there never was a safety or medical basis for the no-exemptions policy, and that its sole intent was a favor for members of the industry they are supposed to regulate; (c) Europe, Japan and other air powers do not follow an age 60 rule; (d) astronauts, military and cargo pilots and the pilots of Air Force One are exempt from the rule; (e) the FAA has not identified a single airline accident anywhere in the world attributable to pilot age; (f) the age 60 rule is a lawfully valid regulation but of economic, not safety, relevance, and (g) the FAA, pursuant to 49 U.S.C. § 44701(f), has authority in the public interest to grant exemptions from it.

The court's one-paragraph judgment, rendered after an 11th-hour cancellation of the scheduled hearing, reads as if the panel hardly read past the first page of the FAA's argument. It adopted the FAA's factually incorrect claims that (a) the pilots here challenged the validity of the age 60 rule; (b) safety issues were the basis for the agency's denial of exemptions, and (c) the pilots provided no specific information showing why the requested exemptions would not adversely affect safety. In fact, the pilots showed that their exemption would not adversely affect safety, not only because they have unblemished medical and safety records, but also because the rule never had anything to do with safety. The pilots did not argue that the rule was invalid, but rather acknowledged that it was a valid regulation while showing its only purpose was economic. By deceptively equating the pilots' request for exemptions to a legal challenge to the validity of the regulation, the FAA induced the panel to deny the pilots their day in court. The pilots now ask the court to remand the case to the FAA for a decision on whether to exempt each of the 12 petitioners, consistent with the record and the law.

The same favoritism that gave birth to the age 60 rule also has caused the FAA to ignore safety controls inherent in its overall regulatory system (pet. notes 107-113, 130, 214 and associated text), in rigid adherence to its unwritten policy of automatic denial of all requests for exemptions. The regulation was not invalidated by its secret economic purpose, nor by the fact that the FAA used false data to give it a "safety" spin. But the agency's denial of exemptions lacks legitimacy on account of its reliance on falsified data and its failure to refute the petitioners' evidence.

Where there is showing that an exemption would have no adverse effect on safety, the FAA concedes that it has a statutory duty to base its decision on what best will serve the public interest. The FAA's secret presumption that

its no-exemptions policy has an economic justification has no more validity than its discredited presumption that the policy has a safety justification.

The central facts, concerning the lack of any medical/safety basis for either the age 60 rule or the FAA's no-exemptions policy, are as follows: The rule was created in 1959 by FAA Administrator Elwood Quesada as a favor for his friend, C. R. Smith, chairman of American Airlines, who had lost a series of labor disputes over the airline's age 60 retirement policy (pet. at 10-14)(J.A. 017-022). FAA lawyers from the outset privately stated there was no evidence that could provide any "scientific or factual justification" for the rule (id. at 14-15)(J.A. 021-022). The National Institutes of Health refuted claims that there was any medical justification for the rule (id. 23-27)(J.A. 030-034). The FAA persisted in publicizing flawed "studies" that grossly distorted data to create a false impression that pilots over age 59 were less safe (id. at 23-24, 57-65, exhibit U)(J.A. 030-031, 064-072, 156-157). The agency was aware of deficiencies in age-safety data on which it relied. Yetman v. Garvey, 261 F.3d 664, 677 (7th Cir. 2001). Fallacies and falsehoods in age-safety data on which FAA has relied has long been well known in the scientific community (id. at 58-59)(J.A. 065-066). It is undisputed that enlightened airline executives today are opposed to the FAA's no-exemptions policy. It is undisputed that a former FAA Administrator, a former Federal Air Surgeon and other FAA officials admitted that there never was any safety or medical basis for the age 60 rule, and that its sole intended purpose was economic favoritism for members of the industry they are supposed to regulate (id. at 27-28, 55-56)(J.A. 034-035, 062-063).

Using dispositive Supreme Court precedent, this court was required to grant judicial review of the agency's denial of the pilots' request for exemptions. Persons harmed

by an agency action have a right of judicial review (Abbott Laboratories v. Gardner, 387 U.S. 136, 140 (1967). This court was required to follow its own rule, that persons harmed by agency's dissemination of questionable data are entitled to their day in court (Tozzi v. U.S. Dept. of Health and Human Services, 271 F.3d 301, 307 (D.C. Cir. 2001). The court must deal with the merits of the case. Here the presumption of deference to the "expert" agency is overcome by evidence - including formerly secret records from FAA files - revealing there was no safety basis for the no-exemptions policy. The court owes no deference to FAA's "expert" assurances because the government's own data suggests the contrary (U.S. Air Tour Ass'n v. FAA, 298 F.3d. 997, 1018).

Government-wide guidelines promulgated by the Office of Management and Budget under the Information Quality Act have the full force of law. So long as a federal regulation is extant, the Executive Branch is bound by it (U.S. v. Nixon, 418 U.S. 683, 695 (1974). The aforesaid Information Quality guidelines of 2002 were in force when the FAA on October 6, 2003 denied the pilots' request for exemptions. On its face, the order denying exemptions made no attempt to comply with these congressionally mandated guidelines. The order denying the requested exemptions was dictated by an unwritten no-exemptions policy founded on distorted and falsified data - the antithesis of standards of scientific validity mandated by the guidelines. The FAA order, which failed to comply with applicable law, must be found invalid.

Even if the Information Quality guidelines were found not to be binding, this court still must find the order invalid because it fails the "substantial evidence" test. According to the rule of this circuit, the measure of "substantial evidence" is found in judicially manageable standards. Steenholdt v. F.A.A., 314 F.3d 633, 638 (D.C. Cir. 2003. See also Chlorine Chemistry Council v. E.P.A., 206

F.3d 1286, 1290-91 (D.C. Cir. 2000). Judicially manageable standards are to be found in regulations. Padula v. Webster, 822 F.2d 97, 100 (D.C. Cir. 1987). Even if the guidelines were not per se binding, nevertheless they supplied standards judicially manageable for the purpose of defining arbitrary and capricious conduct, abuse of agency discretion, and insubstantial evidence. Judicially manageable standards also are to be found in statutes that circumscribe agency discretion Lincoln v. Vigil, 508 U.S. 182, 193 (1993). Congress has ordered such standards in statutes that circumscribe FAA's discretion in deciding whether to grant the exemptions sought by the petitioners here.

Congress has mandated that the FAA, in deciding whether to grant the exemptions, "shall consider" the following as being in the public interest:

- The requirements of national defense and commercial aviation (49 U.S.C. § 40101(c)(1));

- Regulating air commerce in a way that best promotes safety and fulfills national defense requirements (49 U.S.C. § 40101(d)(1)); and

- Encouraging and developing civil aeronautics (49 U.S.C. § 40101(d)(2)).

The pilots have shown conclusively that the rule is not safety-related but rather economic in nature. The FAA, in deciding whether to grant exemptions, has a statutory duty to consider the following additional matters identified in 49 U.S.C. § 40101(a), (b), among other factors, as being in the public interest:

- Assigning and maintaining safety and security as the highest priority in air commerce (49 U.S.C. § 40101(a)(1));

- Preventing deterioration of established safety procedures (49 U.S.C. § 40101(a)(3));

- Assuring the availability of adequate service without unreasonable discrimination or unfair or deceptive practices (49 U.S.C. § 40101(a)(4), (b)(3));

- Coordinating transportation by, and improving relations among, air carriers, and encouraging fair wages and working conditions (49 U.S.C. § 40101(a)(5));

- Strengthening the competitive position of air carriers to at least ensure equality with foreign air carriers, including the attainment of the opportunity for U.S. air carriers to maintain and increase their profitability in foreign air transportation (49 U.S.C. § 40101(a)(6), (a)(15), (e)(1));

- Developing and maintaining a sound regulatory system as to the present and future needs of the commerce of the United States and the national defense (49 U.S.C. § 40101(a)(7), (b)(1)(C));

- Preventing unfair, deceptive or predatory practices (49 U.S.C. § 40101(a)(9));

- Ensuring that consumers in all regions of the United States, including those in small communities and rural and remote areas, have access to affordable, regularly scheduled air service (49 U.S.C. § 40101(a)(11), (a)(13));

- Encouraging and developing practices to provide efficiency, innovation and low prices (49 U.S.C. § 40101(a)(12)).

This case should be remanded to the agency for reconsideration in light of the aforesaid non-discretionary, statutory mandates. FAA officials never identified their underlying economic motives beyond vague references to pilot training costs and airline administrative convenience. However, relying on the FAA's past exemptions from the rule, for international pilots and carriers (pet. notes 35, 36, 267 and associated text)(J.A. 013, 073) and domestic pilots and carriers (id., note 259 and associated text); 60 Fed. Reg. 65833, 65843, Dec. 20, 1995), changes in international regulatory policies and practices (id., note 263 and associated text)(J.A. 072), including U.S. treaty obligations, and in light of well-known economic conditions in the domestic airline industry, petitioners proffer the following suggestions as possible exemption practices. On remand, the FAA could, for example:

a. limit the exemptions to pilots and/or carriers with demonstrated safety records and/or stable economic balance-sheets (pursuant to 49 U.S.C. § 40101(a)(2), under

which the FAA must evaluate the safety implications of new air transportation services).

b. limit the exemptions to domestic carriers and operations only (pursuant to 49 U.S.C. § 40101 (a)(7), (b)(1)(C), for developing and maintaining a sound regulatory system as to the present and future needs of the commerce of the United States and the national defense, and consistent with the U.S. treaty obligations as a member of the International Civil Aviation Organization).

c. limit the exemptions to pilots and carriers serving developing, regional, and secondary markets only (pursuant to 49 U.S.C. § 40101 (a)(8), encouraging air transportation at major urban areas through secondary or satellite airports, consistent with regional airport plans of regional and local authorities).

d. limit the exemptions to the same standards adopted by the European Community through its Joint Aviation Authority, i.e., age 65 for one pilot in a multi-pilot crew, where at least one other pilot is under age 60 and fully qualified in the aircraft and operations undertaken (pursuant to 49 U.S.C. § 40101(a)(6)(B), to promote international competitiveness of U.S.-based airlines).

e. grant broad exemptions to mitigate disparities between the high-cost legacy carriers – most now in or near bankruptcy – and newer, low-cost carriers (pursuant to 49 U.S.C. § 40101 (a)(4), (5), and (6)(A),(B), to promote efficient operations, fair employment, and competitiveness of domestic airlines). The "early" retirement mandate and defined benefit pension plans of the legacy carriers threaten not only the solvency of the carriers but also the solvency of the Pension Benefit Guaranty orporation. Mandatory retirement at age 60 deprives these

trust funds of their major interest/investment income while extending payout years.

The exemptions sought here are not orders for employment but rather the removal of a prohibition of employment. See Sibley Memorial Hospital v. Wilson, 488 F.2d 1338, 1340 (D.C. Cir. 1973) ("Control over access to the job market may reside, depending upon the circumstances of the case," in an entity other than the employer.) Through its age 60 no-exemptions policy, the FAA restricts employment contract opportunities between third parties (pilots and airlines). The employment of exempted pilots would remain subject to all policies, rules, regulations and statutes governing air operations, to ensure the highest possible degree of safety in the public interest. Ironically, 29 U.S.C. § 633a bars the FAA from removing its own pilots from flight duties at age 60, even though they fly the same types of aircraft in the same airspace as air carriers and pilots subject to its no-exemptions policy.

The central issue raised in this case – the FAA's claim of a medical/safety justification for its decades-long refusal to grant even a single exemption from the age 60 rule – must be adjudicated on the merits. Both the rule and the no-exemptions policy have been controversial for decades. In its 1995 Disposition of Comments (Fed. Reg. 65977, 65980, Dec. 20, 1995; Disposition of comments and notice of agency decisions), the FAA said more than 100 exemption petitions were pending. In the last decade, four substantantive challenges have clogged calendars of two circuits. The undisputed evidence in the present case shows that the agency's assertion of a medical or safety rationale was never more than a pretext. The record here provides the first serious challenge to the FAA's credibility concerning the purpose and effect of the no-exemptions policy. This case is ripe.

This is not the first time that the agency has misconstrued requests for exemption as requests to overturn the regulation. The FAA in 1995, addressing more than 100 petitions for exemptions then outstanding, declared without prior notice or public comment that it would consider no petition for exemption from the rule unless it contained a protocol that would allow the FAA to change the rule itself:

> The FAA has determined that the petitioners have not shown their circumstances to be unique compared with those who comply with the rule, and that the issues they raise are more appropriately considered in connection with whether the FAA should propose to change the general rule.

60 Fed.Reg. 65977, 65980, id.; Disposition of comments and notice of agency decisions. The disposition's summary explained:

> This action announces FAA's decisions on a number of issues regarding the FAA's "Age 60 Rule". The issues include: responding to the comments requested in 1993 regarding various aspects of the Age 60 Rule, including the "Age 60 Project, Consolidated Database Experiments, Final Report", and issues raised by pilots seeking exemptions from the Age 60 Rule, issues raised by a petition for rulemaking by the Professional Pilots Federation (PPF), requesting the FAA to remove the Age 60 Rule.

Id. at 65977, n. 1.

That document examined virtually every aspect of the age 60 debate - history, science, medical and cognitive

testing, performance evaluations, statistical studies, operational distinctions, international policies, etc. Rejecting each as a basis for change, FAA made no distinction between standards it would require for a single exemption or for a change to the general rule. The agency said it made no attempt to evaluate economic impacts: "The FAA has not evaluated the economic impact of a proposed change." Id. at 65984. By its circular reasoning, the FAA considers any substantive petition for exemption not as an exemption from the rule, but as a petition for a change in the rule. This court is bound, not by this Kafkaesque policy, but rather by the legal standards discussed above.

Multiple waivers, exemptions from the age 60 rule have been granted by the FAA to both foreign and domestic operators and pilots, without requiring any particularized showing of individual characteristics. All were granted on broad claims by requesters, acknowledged by the FAA, based on economic factors. These included direct costs, training amortization costs, pilot hiring/replacement costs, airline scheduling convenience, etc. Id.

The FAA conceded that it is required to consider economic factors in addition to requirements enumerated in 49 U.S.C. § 40101. The agency said:

> Changes to Federal regulations must undergo several economic analyses. First, Executive Order 12866 directs that each Federal agency shall propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs. Second, the Regulatory Flexibility Act of 1980 requires agencies to analyze the economic effect of regulatory changes on small entities. Third, the Office of Management and Budget directs agencies to

> assess the effect of regulatory changes on international trade.

Commuter Operations and General Certification and Operations Requirements; Air Carrier and Commercial Operator Training Programs; Final Rules, 60 Fed. Reg. 65831, 65899, Dec. 20, 1995.

By means of a rule change, the FAA imposed stringent equipment, personnel, operational, maintenance, and procedural standards on operators of aircraft having 10 to 30 seats. Id. The standard compliance date for most of the new standards and procedures was 15 months after publication of the final rule. Waivers, exemptions from compliance, were established for certain elements, some as long as 15 years. Id. at 65849-53. In particular, the age 60 rule was imposed on the operators and pilots of the affected aircraft, but blanket exemptions were extended automatically for four years.

> The FAA is unable to quantify the costs to operators or to affected pilots. The nature and magnitude of these costs depend upon the alternatives available to each party, which the FAA has been unable to identify in sufficient detail to estimate costs. The FAA believes that the four-year phase-in of this requirement will help to minimize any potential disruptions the rule may cause and that the resulting cost are not likely to be substantial. The FAA also believes that the age 60 requirement is essential to achieve the "one level of safety" goal established by the Secretary of Transportation and that any cost of this requirement is justified by its benefits.

Id. at 65902.

When the FAA in 1992 extended the dates for its enforcement of the International Civil Aviation Organization version of the age 60 rule in U.S. airspace against operators and pilots of foreign carriers, the FAA saw no safety issue and granted their exemptions on economic grounds - pilot training costs and the carriers' administrative convenience.

As the pilots' petition told the FAA:

> When the FAA announced in 1995 that the age 60 rule would be applied starting four years later to most part 135 operations, including pilots, it specifically stated that the reason for this decision was safety data. However, when the International Civil Aviation Organization requested such data in a survey of member nations, the FAA - notwithstanding the fact that most part 135 captains were required to hold the same credentials as part 121 captains, and *all part 135 pilots* (captains included) *were allowed to fly* - and many did fly - *past age 60* - responded that it had never accessed any such data. FAA told ICAO that such data exists but that FAA did not even know whether it was accessible.

Pet. at 63-4 (J.A. 070-071)(emphasis in original) (footnotes omitted). It has been clear for many years that the agency's pilot age policies have been arbitrary.

In sum, the panel misread the petition, misconstruing a petition for exemptions as if it were a request to invalidate the underlying regulation, and misinterpreting an economic argument as a safety issue. This court should find, based on the overwhelming evidence in the record, that there was not, and still is not,

any medical or safety basis for the FAA's no-exemptions policy. The court should remand the case to the agency, to reconsider the denial of exemptions according to the criteria mandated by 49 U.S.C. § 40101.

CONCLUSION

For the foregoing reasons, the panel should rehear the case, and the Court should grant rehearing en banc.

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on November 18, 2004, I filed with the Clerk's Office of the United States Court of Appeals for the District of Columbia Circuit, via hand-delivery, the required copies of the foregoing Amended Petition for Rehearing with Petition for Rehearing En Banc, and further certify that I served, via UPS Second Day Air transportation, the required copies of same to the following:

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The necessary filing and service upon Counsel were performed in accordance with the instructions given me by counsel in this case.

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ADDENDUM

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 03-1386 September Term, 2004

Dallas E. Butler *et al.*,
Petitioners,

v.

Federal Aviation Administration,
Respondent.

On Petition for Review of an Order of
the Federal Aviation Administration.

Before: EDWARDS, HENDERSON and GARLAND,
Circuit Judges.

JUDGMENT

[ENTERED: SEPTEMBER 24, 2004]

This cause was considered on the record from the Federal Aviation Administration (FAA) and on the briefs by counsel. The petitioners, who are licensed and certified pilots over age 60, seek review of an FAA order denying their applications for exemption from the "Age 60 Rule," 14 C.F.R. § 121.383(c), which prohibits a pilot from serving on a commercial airplane after his 60th birthday. Although the petitioners purport to seek an "exemption," the petition lacks specific information to justify exempting the individual petitioners as required under the FAA regulations. *See* 14 C.F.R. § 11.61 ("You must include the following information in your petition for an exemption...The reasons why granting the exemption would not adversely affect safety, or how the exemption would provide a level of safety at least equal to that

provided by the rule from which you seek the exemption...."). It is plain from the petitioners' arguments before the agency and before the court that they initiated this proceeding in order to challenge directly the validity of the rule itself, which is properly effected only through a petition for rulemaking rather than a petition for exemption. *See* 14 C.F.R. §§ 11.61, 11.73; *see also Yetman v. Garvey*, 261 F.3d 664, 668-69 (7th Cir. 2001); *Keating v. FAA*, 610 F.2d 611, 612 (9th Cir. 1979); *Rombough v. FAA*, 594 F.2d 893, 897 (2nd Cir. 1979). Accordingly, it is

ORDERED that the petition for review is denied.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or rehearing en banc. *See* Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

FOR THE COURT:

/s/
Mark J. Langer, Clerk

Oral Argument
Scheduled for September 13, 2004

In the
United States Court of Appeals
for the
District of Columbia Circuit

No. 03-1386

DALLAS E. BUTLER, TOM GAMBLE, JEANNIE C. de LAMOS, PAUL TURNER III, ALAN J. De SA, ARTHUR B. WARD, WOODROW M. HASSINGER, RUDY MACK, SR., JOE R. McCABE, PHILIP B. NASH, MICHAEL L. OKSNER, and WILLIAM M. SIEGEL,

Petitioners,

v.

MARION C. BLAKEY, Administrator, Federal Aviation Administration, and NORMAN Y. MINETA, Secretary, U.S. Department of Transportation,

Respondents.

Petition for Review of an Order denying Relief by the Federal Aviation Administration, Department of Transportation, Docket No. FAA-2002-12501-6781, issued on October 9, 2003

FINAL BRIEF FOR PETITIONERS-APPELLANTS

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June 11, 2004

CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

CERTIFICATE OF COUNSEL
REQUIRED BY D.C. CIR. RULE 28(a)(1)

(A) PARTIES AND AMICI

The 12 parties who petitioned the Federal Aviation Administration, and who appeal the agency's decision, are:

Dallas E. Butler
Tom Gamble
Jeannie C. de Lamos
Paul Turner III
Alan J. De Sa
Arthur B. Ward
Woodrow M. Hassinger
Rudy Mack, Sr.
Joe R. McCabe
Philip N. Nash
Michael L. Oksner
William M. Siegel

The Southwest Airlines Pilots Association (SWAPA) anticipates filing an *amicus curiae* brief in support of this petition. No intervenors or other amici have been identified in this matter.

(B) RULINGS UNDER REVIEW

The ruling at issue in this Court is an Order by John M. Allen, Acting Director, Flight Standards Service, Federal Aviation Administration, United States Department of Transportation, Docket No. FAA-2002-12501-6781, issued on October 9, 2003.

A copy of that Order is attached to the Petition for Review of Agency Order that the petitioners here filed October 30, 2003.

The Order was announced in Summary Notice No. PE-2003-74, at 68 Fed. Reg. 69761, 69764 (Dec. 15, 2003).

(C) RELATED CASES

The case under review was not previously before this Court or any other court. No other related cases are currently pending in this Court or any other court of which counsel is aware.

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Statement by 60 leading scientists including 20 Nobel laureates, quoted in James Glanz, Scientists Say Administration Distorts Facts, N.Y. Times, Feb. 19, 2004, at A21 9

Aerospace Medical Association, The Age 60 Rule, position paper (Jan. 15, 2004), at 16 19

GLOSSARY

ADEA	Age Discrimination in Employment Act
ALPA	Airline Pilots Association
FAA	Federal Aviation Administration
NASA	National Aeronautics and Space Administration
NLRB	National Labor Relations Board
OMB	Office of Management and Budget
PPF	Professional Pilots Federation
SEC	Securities and Exchange Commission

BASIS FOR JURISDICTION

(A) According to 49 U.S.C. § 44701(f), the Federal Aviation Administration (FAA) has statutory authority in the public interest to grant the regulatory exemptions which the pilots' petition requested in June 2002. The regulation from which exemption is sought, 14 C.F.R. § 121.383(c), bars any person from operating as a commercial airline pilot beyond the age of 59. The pilots in this case are experienced present and former commercial airline pilots around age 60.

(B) According to 49 U.S.C. § 46110 (a), the United States Court of Appeals for the District of Columbia Circuit has statutory authority to grant review of an order of the FAA.

(C) The pilots filed this petition for review by this Court on October 30, 2003, less than 30 days after the FAA's October 6, 2003 order. This filing satisfies the requirement of 49 U.S.C. § 46110 (a) that a petitioner must file a petition not later than 60 days after the agency issues its order.

(D) This appeal is from a final order that disposes of all the parties' claims.

STATEMENT OF ISSUES

I. The Agency Decision in this case relied on information that failed to meet Congressionally mandated standards.

II. The Agency did not base its decision on substantial evidence.

III. The record as a whole justifies rejecting the credibility of findings made and relied upon in this Agency Decision.

IV. The Agency Decision was unwarranted in light of facts subject to this Court's *de novo* review.

V. The Agency Decision was arbitrary, an abuse of discretion, and lacking in good faith.

VI. The Agency Decision was contrary to equal protection of the laws.

VII. The Agency Decision was contrary to due process of law.

VIII. The FAA should not automatically ground pilots age 59 and over who meet all applicable medical, performance, and safety standards.

STATEMENT OF THE CASE

Dallas E. Butler and 11 other experienced commercial airline pilots petitioned the Federal Aviation Administration (FAA) for exemption from 14 C.F.R. § 121.383(c), a regulation that bars pilots from flying commercial airliners after age 59. All of them either currently operate as commercial air carrier plots or did so until the age rule forced them out. Sixteen months after receiving the June 10, 2002, petition, the FAA denied the

petition for exemption. The pilots have petitioned this Court for review of the agency decision.

STATEMENT OF FACTS

Twelve experienced pilots have requested exemption from 14 C.F.R. § 121.383(c), commonly known as the age 60 rule. This regulation bars any person from operating as a commercial airline pilot (*i.e.*, in Part 121 air carrier operations) beyond the age of 59. These 12 pilots are licensed and medically certified, fully trained, performance qualified and experienced in flying such aircraft in air carrier operations. Their names and birth dates are:

Dallas E. Butler	April 25, 1938
Jeannie C. de Lamos	February 9, 1942
Alan J. De Sa	July 5, 1941
Tom Gamble	January 13, 1945
Woodrow M. Hassinger	October 24, 1940
Rudy Mack, Sr.	February 9, 1941
Joe R. McCabe	August 27, 193 8
Philip B. Nash	April 4, 1938
Michael L. Oksner	April 5, 1944
William M. Siegel	September 6, 1943
Paul Turner III	September 10, 1946
Arthur B. Ward	April 27, 1937

The first FAA Administrator, Elwood Quesada, created the age 60 rule in 1959 as a favor for his friend, C.R. Smith, the Chairman of the Board of American Airlines, who had lost labor disputes over the company's unilaterally imposed age 60 retirement policy. *J.A. 17-21* (Petition at 10-14). FAA in-house lawyers from the beginning stated privately that there was no evidence that could provide any "scientific or factual justification" for the age regulation. *J.A. 21-22* (Id. at 14-15); *J.A. 150* (Exhibit Q). The FAA purported to justify the establishment of the rule on the basis of "general

knowledge" that there was an inverse relationship between pilot age and skill. *J.A. 23* (Id. at 16); *J.A. 152* (Exhibit S). Over the years the agency has refrained from collecting, analyzing and publishing data which would show that there never was any safety basis for the rule. *J.A. 29-48, 64* (Id. at 22-41, 57).

In the 1980s the National Institutes of Health refuted assertions that there was any medical justification for the rule. *J.A. 30-34* (Id. at 23-27). The FAA nevertheless persisted in promoting flawed statistical "studies" which grossly distorted data to create a false impression that pilots over age 59 were less safe. *J.A. 30-31, 64-27* (Id. at 23-24, 57-65); *J.A. 156* (Exhibit U). In fact, "fail-safe" procedures in multiple crew airliners eliminated risk of accident due to a pilot's medical incapacitation regardless of age. *J.A. 48-56* (Id. at 41-49). The FAA Deputy Administrator conceded the effectiveness of these "fail-safe" procedures in congressional testimony. *J.A. 56-57* (Petition at 49-50).

The Federal Air Surgeon privately acknowledged, in writing, that the real basis for the age rule was economic, not medical. *J.A. 62* (Id. at 55); *J.A. 158-161* (Exhibit CC), He and other FAA officials conceded, in a private Capitol Hill meeting, that the sole purpose of the age rule was to serve economic interests of the airline industry, not to ensure medical or safety concerns. *J.A. 62-63* (Id. at 55-56); *J.A. 162-175* (Exhibits DD, EE, FF).

The United States is virtually the only major commercial air power in the world that mandates retirement of airline pilots at age 60. *J.A. 76-77* (Id. at 69-70).

The FAA has statutory authority to grant the requested exemption. 49 U.S.C. § 44701(f). And it has a statutory duty to decide the matter on the basis of the public interest in air safety and security, national defense and

commercial aviation, and avoidance of discriminatory and deceptive practices. *J.A. 10-12* (Id. at 3-5)

SUMMARY OF THE ARGUMENT

Allowing qualified commercial airline pilots an exemption to fly past age 59 is consistent with air safety because the age 60 rule has never had anything to do with safety. The FAA's sole motivation for its no-exemptions policy is its predisposition to perform economic favors for interests (*i.e.*, the airlines) that the agency is supposed to regulate. The policy of denying all exemptions based on data distortions and loaded studies does not measure up to congressionally mandated standards.

Basing exemption denials on age stereotype and unscientific misrepresentation fails the test of substantial evidence. The record as a whole, including internal FAA documents revealing economic favoritism and ethical blindness, shows that the agency is not a credible source of findings with respect to this issue. This Court is entitled to undertake a *de novo* review of the decision by an administrative agency that has undermined its own credibility. This review should take into account what is known about the safety performance of the most experienced United States pilots, such as the 12 requesting exemption in this case, as well as the policies and practices of other countries around the world. The agency demonstrated lack of good faith because it refused to admit past misconduct, and then unreasonably delayed and distorted the petition by these 11 men and one woman who seek to serve the public interest by continuing to fly. Unbending age discrimination violates equal protection when it is not a *bona fide* occupational qualification. Arbitrary age 60 retirement of men and women who continue to satisfy all objective criteria for the

responsibilities they perform is likewise inconsistent with due process.

Now more than ever, the nation needs its most experienced, reliable pilots in command of commercial airliners. Those who meet all of the relevant standards and who request exemption from the age rule should be allowed to continue to fly, for the sake of the flying public.

ARGUMENT

I. THE AGENCY DECISION IN THIS CASE RELIED ON INFORMATION THAT FAILED TO MEET CONGRESSIONALLY MANDATED STANDARDS.

In this case, 12 experienced airline pilots around age 60 requested exemption from the age 60 rule mandating their retirement. 14 C.F.R. § 121.383(c). Congress expects that some pilots will receive exemptions. Rombough v. FAA, 594 F.2d 893, 897 (2nd Cir. 1979). Still, the FAA policy denies exemptions to all such petitioners. The pilots' petition established that the requested exemptions would be consistent with air safety, and the FAA age rule never involved safety. Economic favoritism for airlines is the only motivation for the agency's no-exemptions policy. The FAA, however, is supposed to regulate in the public interest. The agency decision below did not rebut, but merely ignored the factual history of the age 60 rule's economic favoritism. *J.A. 12-13, 17-18* (Petition at 5-6, 10-16); *J.A. 106-107, 133-144* (Exhibits C, K, M). The denial violated the agency's statutory duty to base exemption decisions on the public interest in air safety and security, national defense, domestic commercial aviation, nondiscrimination, and good-faith dealing with other agencies. 49 U.S.C. §§ 44701(f) and 40101(a) *et seq.* (The Petition itemizes the statutory mandates.) *J.A. 10-12* (Petition at 3-5). The agency's assertion

that the pilots' exemption petition did not address these standards is simply untrue. *J.A. 190* (Decision at 8).

The agency decision ignored evidence that the FAA based the policy on false and misleading safety data. *J.A. 30-31, 64* (Petition at 23-24, 57). The agency's assertion that the pilots' challenge to the basis of its policy does not meet some unspecified requirements for exemption is gratuitous. *J.A. 191* (Decision at 9). The decision ignored evidence proving that the exemptions would maintain and/or improve air safety concerning pilots' medical screening and fitness, *J.A. 57-59* (Petition at 50-52); effectiveness of performance testing, *J.A. 59-60* (Id. at 52-53), the "fail-safe" two-pilot communication rule, *J.A. 48-57, 61* (Id. at 41-50, 54), and positive experience-safety correlation. *J.A. 59* (Id. at 52).

The decision disregarded evidence that the age policy did in the past, and may in the future, harm military aviation and small communities' air service. *J.A. 78-80* (Id. at 71-73).

The decision failed to address the agency's violation of the Information Quality Act and pertinent Office of Management and Budget guidelines. The agency was aware of deficiencies in the Flight Time Study on which it publicly relied. Yetman v. Garvey, 261 F.3d 664, 677 (7th Cir. 2001). Analytical flaws, fallacies and falsehoods of that study are common knowledge in the scientific community. *J.A. 64-70* (Petition at 57-63). The agency continued relying on this study notwithstanding the fact that it has been discredited. *J.A. 65-66* (Id. at 58-59). The decision dismissed the argument that the FAA intentionally misrepresented data concerning various studies, including the Flight Time Study, saying that Baker v. FAA, 917 F.2d 318 (7th Cir. 1990), as well as Yetman disposed of that claim. *J.A. 193* (Decision at 11). The FAA, however, cannot rely on flawed studies that violate the Information Quality Act's guidelines. *Treasury*

and General Government Appropriations Act for Fiscal Year 2001, Pub. L. No. 106-554, §515 (2001). In reviewing the agency decision, this Court must consider the relevant mandatory federal data quality standards. Judicial review of an administrative order must address evidence that the agency ignored serious consequences and realistic alternatives. (*Cf.* Izaak Walton League of America v. Marsh, 655 F.2d 346, 369 n. 56 (D.C. Cir. 1981). The Office of Management and Budget (OMB) promulgated Information Quality Act final guidelines that govern federal agencies that maintain and disseminate analyses of health or safety risks having important public policy or private sector impact. 67 Fed. Reg. 8455 (Feb. 22, 2002). These guidelines, calling for "additional quality checks beyond peer review," set analytic standards of transparency, replicability and robustness. Further, according to the guidelines, "to the degree that an Agency action is based on science," an agency such as the FAA must use:

> (I) the best available, peer-reviewed science and supporting studies conducted in accordance with sound and objective scientific practices; and
>
> (ii) data collected by accepted methods or best available methods (if the reliability of the method and the nature of the decision justifies use of the data).

Id. at 8455-8458. The standards apply to "every step of an agency's development of information, including creation, collection, maintenance, and dissemination." Id. at 8459. As the guidelines provide, "Otherwise, the agency should not disseminate any of the studies that did not meet the applicable standards." Id. at 8467.

The Court must defer to OMB's straightforward guidelines interpreting the data quality statute. *See* Udall v. Tallman, 380 U.S. 1 (1965). The policy in this Circuit is clear. "Our review of an agency's procedural compliance with statutory norms is an exacting one." Natural Resources Defense Council, Inc. v. SEC, 606 F.2d 1031, 1048 (D.C. Cir. 1979). Unfortunately, the Executive Branch in the past few years has "systematically ... misrepresented scientific knowledge and misled the public about the implications of its policies."[1] The information quality guidelines attempt to remedy this problem.

The FAA no-exemptions policy and its denial of the petitioners' request relied on data distortions in flawed studies that obviously do not meet the standards that the Information Quality Act guidelines mandate.

If the falsity of the agency's age-safety representations to House and Senate committees as well as the Office of Technology Assessment and the Government Accounting Office had been timely exposed, the agency could have faced criminal prosecution. The federal penal codes provide that:

> whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch...knowingly and willfully - (1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact; (2) makes any materially false, fictitious, or fraudulent statement or representation; or (3) makes or uses any false writing or document knowing the same to contain materially false, fictitious, or fraudulent statement or entry;

---

[1] Statement by 60 leading scientists including 20 Nobel laureates, quoted in James Glanz, Scientists Say Administration Distorts Facts, N.Y. Times, Feb. 19, 2004, at A21.

> shall be fined under this title or imprisoned not more than 5 years, or both.

18 U.S.C. § 1001.

The agency's decision and the information on which the agency based its decision failed to meet congressionally mandated standards concerning the quality and veracity of data and the public interest.

II. THE AGENCY DID NOT BASE ITS DECISION ON SUBSTANTIAL EVIDENCE.

The substantial evidence test, 5 U.S.C. § 706(2)(E), requires the agency to decide on the entire record. Universal Camera Corp. v. NLRB, 340 U.S. 474, 487-489 (1951). This test requires the reviewing court to weigh the evidence and determine that the record contains such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. Steadman v. SEC, 450 U.S. 91 (1981). A court has little difficulty reversing a decision totally unsupported by credible evidence. *See* Dept. of Transportation, Federal Highway Admin. v. I.C.C., 733 F.2d 105 (D.C. Cir. 1984); Port Norris Exp. Co., Inc. v. I.C.C., 687 F.2d 803 (3rd Cir. 1982).

The deciding official must give the evidence weight to the extent that she or he believes or presumes it to be true. The FAA has a statutory duty to avoid deceptive practices. 49 U.S.C. § 40101(a)(9). The public interest demands that the agency meet a standard of honesty in making and defending its decisions. When the government deceives the people, it violates fundamental public policy. *See* New York Times Co. v. U.S., 403 U.S. 713 (1971). Agency misrepresentation of fact fails the test of substantial evidence.

The agency decision below quoted the Seventh Circuit as saying in Yetman, 261 F.2d at 677, that petitioners there did not establish how the FAA's awareness of Flight Time Study deficiencies impacted the Court's substantial evidence inquiry. *J.A. 193-194* (Decision at 11-12). There is a nexus, however, between agency falsification of fact and judicial review of substantiality. When decisive factors in the agency's rejection of a petition rest on distortion and misrepresentation, the evidentiary basis lacks even minimal substance. The test does not oblige this Court to defer to an agency when the latter intentionally or recklessly relies on false information.

The petitioners in this case extensively documented that the agency's policy of refusing all age exemption requests relied on false representations that the mandatory retirement rule was based on safety considerations. Reviewing the rule's origin and history and the agency's defense of the rule, the petition proved that FAA officials have misrepresented the rule's purpose and effect. The facts establish that the Administrator, Elwood Quesada, created the age rule in 1959, as a personal favor for an airline executive who had lost labor disputes over an airline retirement policy. Notice of Proposed Rulemaking, Maximum Age Limitations for Pilots, 24 Fed. Reg. 5247 (Jun. 27, 1959). Since then, the FAA has rigidly enforced the policy in the mistaken belief that exemptions would impose undue cost and inconvenience on the airlines. The petition also showed how the agency obstructed discovery of evidence relevant to the retirement age policy.

The decision's allegation that "detrimental age decrements" justified denying the petition further illustrates that the agency based its decision on stereotype, not science. *J.A. 191* (Decision at 9). Rather than addressing the evidence of its own economic favoritism (including internal agency documents and statements by FAA officials that the pilots

presented as exhibits), the decision instead relied on a union's blatantly false assertion that the petition offered no evidence that the age rule was a favor to airline executives, *J.A. 188* (Id. at 6).

The decision explained that the Yetman court found that the petitioners there did not meet their burden to provide strong evidence that experience outweighs danger of age-related sudden and subtle incapacitation. *J.A. 194* (Id. at 12). But the decision below ignored the petitioners introduced this necessary evidence, *J.A. 48-57, 59-71* (Petition at 41-50, 52-54).

An arbitrary decision is the inverse of substantial evidence. The question of "whether the administrator was arbitrary must be determined on the basis of what he had before him when he acted...." Association of Data Processing Service Organizations, Inc. v. Board of Governors, 745 F.2d 677, 684 (D.C. Cir. 1984). In 1971 the agency, through its own negligence, lost the FAA docket concerning creation of the age 60 rule. In the absence of the true record, subsequent cases concerning the age rule relied on the agency's *ex post facto* rationalizations. However, in litigation under the Freedom of Information Act (FOIA), petitioners discovered that the lost docket was in the files of a former Federal Air Surgeon. Haley, Bader & Potts v. FAA, No. 85-1943, (D.C.D.C. filed Jun. 15, 1985) (final order Jun. 27, 1985). Petitioners included the "lost" docket and its documents as exhibits to the petition. *J.A. 106-151* (Petition Exhibits C, D, E, F-1, G, H, I, J, K, M, N, O, Q). The decision below, however, denied these records' existence, as the agency did for all these years. The agency's failure to consider this relevant and critical evidence that petitioners introduced was arbitrary and capricious.

An agency must follow its own rules. U.S. v. Nixon, 418 U.S. 683, 696 (1974). The FAA sets forth criteria for risk

assessment in its System Safety Handbook, which states: "Assessment of risk is made by combining the severity of consequence with the likelihood of occurrence." FAA System Safety Handbook, § 3.4. The FAA, however, did not apply its analytical method to the petitioners' evidence establishing that the likelihood of an accident resulting from the exemptions requested here was essentially zero. (Petition at 41-54). The agency's failure to follow its own rules and instead denying the pilots' exemption requests was also arbitrary and capricious.

For the reasons stated above, the FAA's decision fell short of the substantial evidence standard.

III. THE RECORD AS A WHOLE JUSTIFIES REJECTING THE CREDIBILITY OF THE AGENCY'S FINDINGS.

The question of credibility of witnesses and the weight of their testimony is one for the trier of facts. To determine credibility, however, a reviewing court cannot rule mechanically. If the reviewing court does so, it defers to the findings that arise from conflicting evidence. Accordingly, when the record as a whole undercuts the agency's credibility, a court may reject the administrative findings. Town & Country Elec., Inc., 106 F.3d 816 (8th Cir. 1997); NLRB v. Payless Cashway Lumber Store, Inc., 508 F.2d 24 (8th Cir. 1974). A court may also find lack of credibility when the agency bases its ruling on improper or irrational criteria. Breeden v. Weinberger, 493 F.2d 1002 (4th Cir. 1974).

FAA studies supporting the no-exemptions age policy lack factual credibility. Yet, the decision here relied extensively on these studies in analyzing the policy. The petition fully documented the agency's practice of disseminating and relying on data aviation experts and the agency know are distorted. *J.A. 7 et seq.*, 156 (Petition,

Exhibit U). The decision's patently false statements of fact further undermine credibility. The decision relied on FAA published falsehoods about pilot age-safety data.

Further analysis of the decision underscores the lack of credibility. First, the decision contains the preposterous statement that the petitioners did not provide "any information" substantiating exemption. *J.A. 191* (Decision at 9). The amended petition, however, contained 81 pages of factual narrative, 295 footnotes and 39 exhibits supporting exemption. Second, the decision claimed that the petitioners did not introduce any new, significant arguments and/or information from that of prior exemption or rulemaking petitions. *J.A. 191* (Id.) To the contrary, the petition presented significant, new arguments and information (including the internal FAA docket never before seen in an agency or court proceeding).

Third, the decision disregarded the petition's extensive number of exhibits proving that the age rule was an act of economic favoritism with no medical basis. The decision instead asserted that the petitioners did not base their economic favoritism argument on facts. *J.A. 191* (Id.) To reach this conclusion, the decision simply ignored the factual history of economic favoritism contained in the petition. *J.A. 12-13, 17-18* (Petition pp. 5-6, 10-16); *J.A. 106-107, 133-144* (Exhibits C, K, M). The decision falsely implied that Frank Austin, M.D., was not the Federal Air Surgeon when he admitted that the real reason for the age policy was economic, not medical. *J.A. 62* (Petition at 55); *J.A. 158-161* (Exhibit CC). Yet the decision did not dispute that Dr. Austin, Deputy Air Surgeon Jon Jordan (the current Federal Air Surgeon) and other officials admitted that the age policy was merely an economic favor for the airlines and had no medical basis. *J.A. 62-63* (Id. at 55-56).

The decision ignored evidence that the agency deliberately avoided collecting and analyzing accessible data proving that the age rule had no medical or safety basis. *J.A. 29-48, 59-61, 64* (Id. at 22-41, 52-54, 57). The decision ignored scientific studies refuting the FAA age rule. *J.A. 15-17, 28* (Id. at 8-10, 21). Lastly, the decision discounted the evidence establishing that the FAA refused to acknowledge that regular pilot performance and medical checks prevent risk. The decision simply brushed aside the evidence that the FAA repeatedly evaded the truth.

The decision claimed, without any substantiation, that multiple pilot crews do not necessarily provide a redundant safety mechanism because one pilot might not catch and correct the other pilot's infirmity in time. *J.A. 194* (Decision at 12). To reach this conclusion, the decision discounted the "fail-safe" two-pilot communication rule. *J.A. 48-57* (Petition at 41-50). The decision ignored the requirement that commercial airplane design ensures that one pilot could safely fly the plane when the other became incapacitated. 14 C.F.R. § 25.1523, 25.1525 (2004); Appendix D to Part 25, (b)(9), (10), (c).

Fourth, the relevant and newly-found historical evidence made no difference to the agency. In fact, the decision actually claimed that petitioners did not present any "recent" evidence, *i.e.*, evidence less than a decade old. *J.A. 194* (Decision at 12). In actuality, the petitioners presented the most up-to-date evidence (current to the date of the petition) concerning agency policies and practices, congressional inquiries, industry studies, international developments, science and legal studies, and petitioners' qualifications.

The decision asserted, "Finally, petitioners claim that currently there is a pilot shortage...." *J.A. 196* (Id. at 14). The petitioners made no such claim. The decision also stated that

petitioners claimed that modifying the age rule would adversely affect the numbers of pilots leaving military service or those in the airline industry. *J.A. 197* (Id. at 15). While such an adverse impact has occurred at times, *J.A. 78-79* (Petition at 71-72), a reasonable policy of granting age exemptions will prevent future pilot shortages impairing regional airlines and the Armed Forces. Despite these misrepresentations, the decision conceded that rigidly enforcing the age 60 rule would, in the future, likely harm military aviation and regional and charter lines serving small and rural communities. *J.A. 79-80* (Id. at 72-73).

The decision pointed out that age exemption petitions had been unsuccessful in seven cases. Id. at 7, *citing* Yetman, 261 F.2d at 664; PPF v. FAA, 118 F.3d 758 (D.C. Cir. 1997); Aman v. FAA, 856 F.2d 946 (7th Cir. 1988); Keating v. FAA, 610 F.2d 611 (9th Cir. 1979); Rombough, 594 F.2d at 893; Gray v. FAA, 594 F.2d 793 (10th Cir. 1979); and Starr v. FAA, 589 F.2d 307 (7th Cir. 1978). Those petitioners litigated all these cases after the FAA reportedly "lost" the entire age 60 rule docket. None of these cases presented the docket evidencing agency misrepresentation and fraud as the instant case does. Further, none of these cases relied on scientific data integrity criteria which the 2002 Information Quality Act guidelines imposed. 67 Fed. Reg. 8455-8458 (2002). The FAA rendered the instant decision in 2003.

The Seventh and Tenth Circuits warned that courts could overturn exemption denials if petitioners established that the FAA failed to consider effects of medical technology advances upon a mandated age 60 cutoff. Starr at 589 F.2d 314; Gray at 594 F.2d 795. According to this same line of reasoning, overturning denials is essential when evidence establishes that the FAA's medical argument for its age policy lacks scientific basis. Given the petition's evidence about the lack of medical necessity, this Court should overturn the age exemptions denial here. Such action is

inescapable given the evidence that the FAA knowingly misled the international community, *J.A. 70-71* (Petition at 63-64), as well as other federal agencies, courts, Congress, the press and the people about the age 60 rule.

Significantly, the decision below did not dispute that FAA lawyers knew from the rule's inception that no scientific studies or facts ever justified the age rule. *J.A. 22* (Petition at 15); *J.A. 150-151* (Exhibit Q).

Thus, the record as a whole shows that the FAA lacks credibility in justifying the age 60 rule and no exemptions policy.

IV. THE AGENCY DECISION WAS UNWARRANTED IN LIGHT OF FACTS SUBJECT TO THIS COURT'S *DE NOVO* REVIEW UNDER THE APA.

The Administrative Procedures Act (APA) authorizes *de novo* review of agency action when the action is adjudicatory in nature and the agency fact finding process is inadequate. 5 U.S.C. § 706(2)(F). In the absence of specific statutory authorization, a court must base *de novo* review on the agency's administrative record. Gables by the Sea, Inc. v. Lee, 498 F.2d. 1340, (5th Cir. 1974); Sierra Club v. Hardin, 325 F. Supp. 99 (D.C. Alaska 1971).

The decision pointed out that several courts had upheld "the basis of the [age 60] rule," *J.A. 189* (Decision at 7), citing PPF v. FAA, 118 F.3d 758 (D.C. Cir. 1997); O'Donnell v. Shaffer, 491 F.2d 59 (D.C. Cir. 1974); ALPA v. Quesada, 276 F.2d 892 (2d Cir. 1960). These cases are inapposite. They relied on the FAA safety representations, which, as this record proves, fabricated material facts.

Foreign courts have rejected the age rule based on the same type of evidence that petitioners introduced. *J.A. 77* (Petition at 70, n. 276). Taking into account court

decisions in other nations is appropriate, as the United States Supreme Court indicated in Lawrence v. Texas, 123 S.Ct. 2472, 2474, 2481, 2483 (2003). This Court may consider these rulings because:

> When a case is properly before the court for a trial de novo, the court must reach its own factual and legal conclusions based on the preponderance of the evidence, and should not limit its consideration to matters previously appraised in the administrative proceedings.

Modica v. U.S., 518 F.2d 374, 376 (5th Cir. 1975).

An American court has not considered foreign precedent. Petitioners' evidence establishes that the age 60 rule is not only out-dated, but out of touch with the world. Europe, Canada, Australia, Japan and other nations do not follow the FAA's age 60 policy.

The evidence establishes even more incongruity concerning the age 60 rule. First, the rule does not apply to federal agency pilots, including FAA pilots, who fly passenger jets, sharing the skies and airports with commercial airliners. Second, the rule does not apply to military pilots, including those flying the President on Air Force One. Third, the rule does not apply to test pilots or NASA astronauts. Therefore, there is no credence in the FAA's position that the age 60 rule promotes the Congressionally-defined public interest, protecting the flying public by licensing the ablest, safest pilots.

After more than two years of study, the Aerospace Medical Association has confirmed that all known medical and safety data still do not support airline pilot restrictions based solely on age. *J.A. 293 et seq., 308* [Aerospace Medical

Association, The Age 60 Rule, position paper (Jan. 15, 2004), at 16].

V. THE AGENCY DECISION WAS ARBITRARY, AN ABUSE OF DISCRETION, AND LACKING IN GOOD FAITH.

Respect for administrative discretion does not mean deference to administrative misconduct. As this Court has held in another context, "an agency action which is supported by the required substantial evidence may in another regard be 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law'." Assoc. of Data Processing Service Organizations, Inc., 745 F.2d at 683.

The facts discussed above reveal that the FAA decision here was arbitrary and an abuse of discretion, within the meaning of 5 U.S.C. 706(2)(A). The agency's bad-faith conduct in the present case includes its knowing reliance on falsified data, misrepresentation of the record and delaying tactics. The FAA made no effort to meet the 120-day target date that 14 C.F.R. § 11.63 prescribes for deciding an exemption petition. Without notice, explanation or excuse, the agency delayed its decision for 16 months. The agency did not act until after the Professional Pilots Federation website reported that the petitioners were about to file an unreasonable-delay action against the agency in United States District Court.

The misrepresentation and fraud described in parts I through IV above have interfered with airline passengers' right to travel in aircraft flown by the most experienced, safest pilots available.

The Court should overturn this decision, based on a record of such misconduct.

VI. THE AGENCY DECISION WAS CONTRARY TO EQUAL PROTECTION OF THE LAWS.

Government action that defeats its own supposed purposes cannot survive the scrutiny associated with equal protection - it even fails the test of rationality. Moreover, for constitutional issues, *de novo* review is appropriate. Agosto v. Immigration and Naturalization Service, 436 U.S. 748, 753-754 (1978). A regulation that purports to be a transportation safety measure, but which in fact has no reasonable relation to safety, is unenforceable in light of countervailing national interest, according to United States Supreme Court precedent. Southern Pacific Co. v. Arizona, 325 U.S. 761 (1945). The actual effects of the FAA's automatic rejection of all age exemptions do not support, and appear to harm, the policy's stated purpose of public safety and its unstated purpose of rendering an economic favor for airline companies. A discriminatory regulation that disserves its own purpose cannot mass constitutional muster under rational basis scrutiny.

Absent the most compelling reasons to the contrary, equal protection bars discriminatory treatment of individuals similarly situated. *See* Bush v. Gore, 531 U.S. 98 (2000). Discrimination based on age bias and bogus science is inconsistent with equal protection

The FAA ordinarily permits alcoholics and cardiac patients under 60 to prove safety/ability through additional medical and performance testing, even where data shows these groups have a high and unpredictable rates of relapse. Yet the agency incongruously denies a similar right to pilots with more than 30 years of good medical and performance records, and who the FAA concedes (due to its own systemic controls) to be the super select and "essentially purged of disease." *J.A. 57-61* (Petition at 50-54). Yet, the FAA automatically treats pilots with good performance

records and who are fit and healthy after age 59 as if they all were disabled.

The FAA's no-exemptions policy violates equal protection.

VII. THE AGENCY DECISION WAS CONTRARY TO DUE PROCESS OF LAW.

Understanding the vital the role of the judiciary in our constitutional scheme, James Madison foresaw that:

> independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power...to resist every encroachment upon rights....

James Madison, Speech in the House of Representatives (June 8, 1789), *reprinted in* Papers of Madison, XII, 206.

Justice Harlan understood that:

> the full scope of the liberty guaranteed by the Due Process clause...is not a series of isolated points.... It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints....

Poe v. Ullman, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting).

And this Court has explained:

> The stringency of our review, in a given case, depends upon analysis of a number of factors, including the intent of Congress, as expressed in the relevant statutes, particularly the agency's enabling statute; the needs, expertise, and impartiality of the agency as regards the issue presented; and the ability of the court effectively to evaluate the questions posed. Only through such a flexible approach can we review the multifarious types of agency actions as responsible participants in an enterprise of practical governance.

Natural Resources Defense Council, 606 F.2d at 1050.

The Court must weigh the agency's statutory duty to base decisions on fact, not fiction; on safety, not stereotype; and to comply with the Constitution's mandate of due process. A regulatory decision based on bias and falsehood is inconsistent with due process requirements. Although the FAA has statutory power to decide who receives a license to fly, the agency cannot exercise this power in an arbitrary or irrational way.

When the FAA denied the petitioners' exemption request on the basis of myth instead of fair consideration of facts, the agency denied the petitioners due process.

VIII. THE FAA SHOULD NOT AUTOMATICALLY GROUND 59-YEAR-OLD PILOTS WHO MEET ALL APPLICABLE MEDICAL, PERFORMANCE AND SAFETY STANDARDS.

The decision below did not dispute the petitioners' observation that enlightened executives of major United

States airlines said they would welcome a change in the FAA age 60 policy. It did not dispute the fact that the United States is virtually alone in the world in imposing mandatory age 60 retirement on airline pilots. *J.A. 76-77* (Petition at 69-70). The decision did not dispute persuasive authority in other jurisdictions finding the age rule contravenes obligations under international human rights law. *J.A. 77-78* (Id. at 70-71).

Enforcing 59 as the maximum age for airline pilots without exception, arbitrary when instituted in 1959, is even more indefensible today. The FAA, clinging to its no-exemptions policy, follows neither its own rules nor the mandates of Congress.

Executive Branch deception of the Judicial and Legislative branches and of the press, the citizenry and the rest of the world, contravenes the public policy of the United States.

It is impermissible for government officials to misrepresent evidence, inciting fear in favor of a policy whose true motive is private profit.

The FAA has a statutory duty to grant the exemptions requested here so as to serve the public interest in air safety, enhance aviation economics, stop unreasonable discrimination, and ensure that the most competent pilots are in command in the event of an air emergency. *J.A. 74-81* (Id. at 67-74).

The FAA should grant pilots who request exemption - and who meet all of the applicable medical, performance and safety criteria - exemptions to fly beyond age 59.

CONCLUSION

For the reasons discussed above, the Court should order the FAA to grant the exemptions requested by Dallas E. Butler and the 11 other named pilots in the instant case.

If, however, the Court decides to remand the case, it should order supervision by a special master so as to ensure the integrity of such further administrative proceedings as may be required.

Respectfully submitted,

March 10, 2004

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CERTIFICATE OF COMPLIANCE
LENGTH OF BRIEF

I am a member of the Bar of this Court and serve as Attorney for Petitioners in this case. I certify the foregoing Brief contains 7,094 words according to the Corel WordPerfect 10 program used to prepare and revise this Brief, in compliance with FRAP Rule 32(a)(7)(C) and Circuit Rule 32(a)(3)(C).

/s/
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CERTIFICATE OF SERVICE

I certify that 2 copies of the foregoing *Final Brief for Petitioners* has been served to the following Agency counsel for Respondent by hand-delivery on June 14, 2004:

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Statutory and Regulatory Addendum:

- 5 USC 706
- 49 USC 40101
- 49 USC 44701
- Pub. Law No. 106-556, §515
- 14 CFR §25.1523
- 14 CFR §25.1525
- 14 CFR Pt. 25, App. D

5 USC 706

§ 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall--

(1) compel agency action unlawfully withheld or unreasonably delayed; and
(2) hold unlawful and set aside agency action, findings, and conclusions found to be--
(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
(B) contrary to constitutional right, power, privilege, or immunity;
(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
(D) without observance of procedure required by law;
(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

49 USC 40101

§ 40101. Policy

(a) Economic regulation.--In carrying out subpart II of this part and those provisions of subpart IV applicable in

carrying out subpart II, the Secretary of Transportation shall consider the following matters, among others, as being in the public interest and consistent with public convenience and necessity:

(1) assigning and maintaining safety as the highest priority in air commerce.
(2) before authorizing new air transportation services, evaluating the safety implications of those services.
(3) preventing deterioration in established safety procedures, recognizing the clear intent, encouragement, and dedication of Congress to further the highest degree of safety in air transportation and air commerce, and to maintain the safety vigilance that has evolved in air transportation and air commerce and has come to be expected by the traveling and shipping public.
(4) the availability of a variety of adequate, economic, efficient, and low-priced services without unreasonable discrimination or unfair or deceptive practices.
(5) coordinating transportation by, and improving relations among, air carriers, and encouraging fair wages and working conditions.
(6) placing maximum reliance on competitive market forces and on actual and potential competition–
(A) to provide the needed air transportation system; and
(B) to encourage efficient and well-managed air carriers to earn adequate profits and attract capital, considering any material differences between interstate air transportation and foreign air transportation.
(7) developing and maintaining a sound regulatory system that is responsive to the needs of the public and in which decisions are reached promptly to make it easier to adapt the air transportation system to the present and future needs of–
(A) the commerce of the United States;
(B) the United States Postal Service; and
(C) the national defense.

(8) encouraging air transportation at major urban areas through secondary or satellite airports if consistent with regional airport plans of regional and local authorities, and if endorsed by appropriate State authorities--

(A) encouraging the transportation by air carriers that provide, in a specific market, transportation exclusively at those airports; and

(B) fostering an environment that allows those carriers to establish themselves and develop secondary or satellite airport services.

(9) preventing unfair, deceptive, predatory, or anticompetitive practices in air transportation.

(10) avoiding unreasonable industry concentration, excessive market domination, monopoly powers, and other conditions that would tend to allow at least one air carrier or foreign air carrier unreasonably to increase prices, reduce services, or exclude competition in air transportation.

(11) maintaining a complete and convenient system of continuous scheduled interstate air transportation for small communities and isolated areas with direct financial assistance from the United States Government when appropriate.

(12) encouraging, developing, and maintaining an air transportation system relying on actual and potential competition--

(A) to provide efficiency, innovation, and low prices; and

(B) to decide on the variety and quality of, and determine prices for, air transportation services.

(13) encouraging entry into air transportation markets by new and existing air carriers and the continued strengthening of small air carriers to ensure a more effective and competitive airline industry.

(14) promoting, encouraging, and developing civil aeronautics and a viable, privately-owned United States air transport industry.

(15) strengthening the competitive position of air carriers to at least ensure equality with foreign air carriers, including

the attainment of the opportunity for air carriers to maintain and increase their profitability in foreign air transportation.
(16) ensuring that consumers in all regions of the United States, including those in small communities and rural and remote areas, have access to affordable, regularly scheduled air service.

(b) All-cargo air transportation considerations.--In carrying out subpart II of this part and those provisions of subpart IV applicable in carrying out subpart II, the Secretary of Transportation shall consider the following matters, among others and in addition to the matters referred to in subsection (a) of this section, as being in the public interest for all-cargo air transportation:

(1) encouraging and developing an expedited all-cargo air transportation system provided by private enterprise and responsive to--
(A) the present and future needs of shippers;
(B) the commerce of the United States; and
(C) the national defense.
(2) encouraging and developing an integrated transportation system relying on competitive market forces to decide the extent, variety, quality, and price of services provided.
(3) providing services without unreasonable discrimination, unfair or deceptive practices, or predatory pricing.

(c) General safety considerations.--In carrying out subpart III of this part and those provisions of subpart IV applicable in carrying out subpart III, the Administrator of the Federal Aviation Administration shall consider the following matters:

(1) the requirements of national defense and commercial and general aviation.

(2) the public right of freedom of transit through the navigable airspace.

(d) Safety considerations in public interest.--In carrying out subpart III of this part and those provisions of subpart IV applicable in carrying out subpart III, the Administrator shall consider the following matters, among others, as being in the public interest:

(1) assigning, maintaining, and enhancing safety and security as the highest priorities in air commerce.
(2) regulating air commerce in a way that best promotes safety and fulfills national defense requirements.
(3) encouraging and developing civil aeronautics.
(4) controlling the use of the navigable airspace and regulating civil and military operations in that airspace in the interest of the safety and efficiency of both of those operations.
(5) consolidating research and development for air navigation facilities and the installation and operation of those facilities.
(6) developing and operating a common system of air traffic control and navigation for military and civil aircraft.
(7) providing assistance to law enforcement agencies in the enforcement of laws related to regulation of controlled substances, to the extent consistent with aviation safety.

(e) International air transportation.--In formulating United States international air transportation policy, the Secretaries of State and Transportation shall develop a negotiating policy emphasizing the greatest degree of competition compatible with a well-functioning international air transportation system, including the following:

(1) strengthening the competitive position of air carriers to ensure at least equality with foreign air carriers, including

the attainment of the opportunity for air carriers to maintain and increase their profitability in foreign air transportation.
(2) freedom of air carriers and foreign air carriers to offer prices that correspond to consumer demand.
(3) the fewest possible restrictions on charter air transportation.
(4) the maximum degree of multiple and permissive international authority for air carriers so that they will be able to respond quickly to a shift in market demand.
(5) eliminating operational and marketing restrictions to the greatest extent possible.
(6) integrating domestic and international air transportation.
(7) increasing the number of nonstop United States gateway cities.
(8) opportunities for carriers of foreign countries to increase their access to places in the United States if exchanged for benefits of similar magnitude for air carriers or the traveling public with permanent linkage between rights granted and rights given away.
(9) eliminating discrimination and unfair competitive practices faced by United States airlines in foreign air transportation, including--
(A) excessive landing and user fees;
(B) unreasonable ground handling requirements;
(C) unreasonable restrictions on operations;
(D) prohibitions against change of gauge; and
(E) similar restrictive practices.
(10) promoting, encouraging, and developing civil aeronautics and a viable, privately-owned United States air transport industry.

(f) **Strengthening competition.**--In selecting an air carrier to provide foreign air transportation from among competing applicants, the Secretary of Transportation shall consider, in addition to the matters specified in subsections (a) and (b) of this section, the strengthening of competition among air

carriers operating in the United States to prevent unreasonable concentration in the air carrier industry.

49 USC 44701

§ 44701. General requirements

(a) Promoting safety.–The Administrator of the Federal Aviation Administration shall promote safe flight of civil aircraft in air commerce by prescribing–

(1) minimum standards required in the interest of safety for appliances and for the design, material, construction, quality of work, and performance of aircraft, aircraft engines, and propellers;
(2) regulations and minimum standards in the interest of safety for–
(A) inspecting, servicing, and overhauling aircraft, aircraft engines, propellers, and appliances;
(B) equipment and facilities for, and the timing and manner of, the inspecting, servicing, and overhauling; and
(C) a qualified private person, instead of an officer or employee of the Administration, to examine and report on the inspecting, servicing, and overhauling;
(3) regulations required in the interest of safety for the reserve supply of aircraft, aircraft engines, propellers, appliances, and aircraft fuel and oil, including the reserve supply of fuel and oil carried in flight;
(4) regulations in the interest of safety for the maximum hours or periods of service of airmen and other employees of air carriers; and
(5) regulations and minimum standards for other practices, methods, and procedure the Administrator finds necessary for safety in air commerce and national security.

(b) Prescribing minimum safety standards.--The Administrator may prescribe minimum safety standards for--

(1) an air carrier to whom a certificate is issued under section 44705 of this title; and
(2) operating an airport serving any passenger operation of air carrier aircraft designed for at least 31 passenger seats.

(c) Reducing and eliminating accidents.--The Administrator shall carry out this chapter in a way that best tends to reduce or eliminate the possibility or recurrence of accidents in air transportation. However, the Administrator is not required to give preference either to air transportation or to other air commerce in carrying out this chapter.

(d) Considerations and classification of regulations and standards.--When prescribing a regulation or standard under subsection (a) or (b) of this section or any of sections 44702-44716 of this title, the Administrator shall--

(1) consider--
(A) the duty of an air carrier to provide service with the highest possible degree of safety in the public interest; and
(B) differences between air transportation and other air commerce; and
(2) classify a regulation or standard appropriate to the differences between air transportation and other air commerce.

(e) Bilateral exchanges of safety oversight responsibilities.--

(1) In general.--Notwithstanding the provisions of this chapter, the Administrator, pursuant to Article 83 bis of the Convention on International Civil Aviation and by a bilateral agreement with the aeronautical authorities of

another country, may exchange with that country all or part of their respective functions and duties with respect to registered aircraft under the following articles of the Convention: Article 12 (Rules of the Air); Article 31 (Certificates of Airworthiness); or Article 32a (Licenses of Personnel).

(2) Relinquishment and acceptance of responsibility.--The Administrator relinquishes responsibility with respect to the functions and duties transferred by the Administrator as specified in the bilateral agreement, under the Articles listed in paragraph (1) for United States-registered aircraft described in paragraph (4)(A) transferred abroad and accepts responsibility with respect to the functions and duties under those Articles for aircraft registered abroad and described in paragraph (4)(B) that are transferred to the United States.

(3) Conditions.--The Administrator may predicate, in the agreement, the transfer of functions and duties under this subsection on any conditions the Administrator deems necessary and prudent, except that the Administrator may not transfer responsibilities for United States registered aircraft described in paragraph (4)(A) to a country that the Administrator determines is not in compliance with its obligations under international law for the safety oversight of civil aviation.

(4) Registered aircraft defined.--In this subsection, the term "registered aircraft" means--

(A) aircraft registered in the United States and operated pursuant to an agreement for the lease, charter, or interchange of the aircraft or any similar arrangement by an operator that has its principal place of business or, if it has no such place of business, its permanent residence in another country; and

(B) aircraft registered in a foreign country and operated under an agreement for the lease, charter, or interchange of the aircraft or any similar arrangement by an operator that

has its principal place of business or, if it has no such place of business, its permanent residence in the United States.

(f)Exemptions.--The Administrator may grant an exemption from a requirement of a regulation prescribed under subsection (a) or (b) of this section or any of sections 44702-44716 of this title if the Administrator finds the exemption is in the public interest.

Treasury and General Government Appropriations Act for Fiscal Year 2001, Pub. L. No. 106-554, § 515 (2001) (Information Quality Act)

(a) In general.--The Director of the Office of Management and Budget shall, by not later than September 30, 2001, and with public and Federal agency involvement, issue guidelines under sections 3504(d)(1) and 3516 [this section] of title 44, United States Code, that provide policy and procedural guidance to Federal agencies for ensuring and maximizing the quality, objectivity, utility, and integrity of information (including statistical information) disseminated by Federal agencies in fulfillment of the purposes and provisions of chapter 35 of title 44, United States Code [this chapter], commonly referred to as the Paperwork Reduction Act.

(b) Content of guidelines.--The guidelines under subsection (a) shall--

(1) apply to the sharing by Federal agencies of, and access to, information disseminated by Federal agencies; and
(2) Require that each Federal agency to which the guidelines apply--
(A) issue guidelines ensuring and maximizing the quality, objectivity, utility, and integrity of information (including statistical information) disseminated by the agency, by not later than 1 year after the date of issuance of the guidelines under subsection (a);

(B) establish administrative mechanisms allowing affected persons to seek and obtain correction of information maintained and disseminated by the agency that does not comply with the guidelines issued under subsection (a); and
(C) Report periodically to the director--
(i) the number and nature of complaints received by the agency regarding the accuracy of information disseminated by the agency; and
(ii) how such complaints were handled by the agency.

14 C.F.R. § 25.1523

CODE OF FEDERAL REGULATIONS
TITLE 14--AERONAUTICS AND SPACE
CHAPTER I--FEDERAL AVIATION ADMINISTRATION, DEPARTMENT OF TRANSPORTATION
SUBCHAPTER C--AIRCRAFT
PART 25--AIRWORTHINESS STANDARDS: TRANSPORT CATEGORY AIRPLANES
SUBPART G--OPERATING LIMITATIONS AND INFORMATION OPERATING LIMITATIONS
Current through May 31, 2004; 69 FR 30786

§ 25.1523 Minimum flight crew.

The minimum flight crew must be established so that it is sufficient for safe operation, considering--
(a) The workload on individual crewmembers;
(b) The accessibility and ease of operation of necessary controls by the appropriate crewmember; and
(c) The kind of operation authorized under § 25.1525.

The criteria used in making the determination required by this section are set forth in Appendix D.

14 C.F.R. § 25.1525

CODE OF FEDERAL REGULATIONS
TITLE 14--AERONAUTICS AND SPACE
CHAPTER I--FEDERAL AVIATION ADMINISTRATION, DEPARTMENT OF TRANSPORTATION
SUBCHAPTER C--AIRCRAFT
PART 25--AIRWORTHINESS STANDARDS: TRANSPORT CATEGORY AIRPLANES
SUBPART G--OPERATING LIMITATIONS AND INFORMATION OPERATING LIMITATIONS
Current through May 31, 2004; 69 FR 30786

§ 25.1525 Kinds of operation.

The kinds of operation to which the airplane is limited are established by the category in which it is eligible for certification and by the installed equipment

14 C.F.R. Pt. 25, App. D

CODE OF FEDERAL REGULATIONS
TITLE 14--AERONAUTICS AND SPACE
CHAPTER I--FEDERAL AVIATION ADMINISTRATION, DEPARTMENT OF TRANSPORTATION
SUBCHAPTER C--AIRCRAFT
PART 25--AIRWORTHINESS STANDARDS: TRANSPORT CATEGORY AIRPLANES
Current through May 31, 2004; 69 FR 30786

Appendix D to Part 25

Criteria for determining minimum flight crew. The following are considered by the Agency in determining the minimum flight crew under § 25.1523:
(a) Basic workload functions. The following basic workload functions are considered:
(1) Flight path control.

(2) Collision avoidance.
(3) Navigation.
(4) Communications.
(5) Operation and monitoring of aircraft engines and systems.
(6) Command decisions.
(b) Workload factors. The following workload factors are considered significant when analyzing and demonstrating workload for minimum flight crew determination:
(1) The accessibility, ease, and simplicity of operation of all necessary flight, power, and equipment controls, including emergency fuel shutoff valves, electrical controls, electronic controls, pressurization system controls, and engine controls.
(2) The accessibility and conspicuity of all necessary instruments and failure warning devices such as fire warning, electrical system malfunction, and other failure or caution indicators. The extent to which such instruments or devices direct the proper corrective action is also considered.
(3) The number, urgency, and complexity of operating procedures with particular consideration given to the specific fuel management schedule imposed by center of gravity, structural or other considerations of an airworthiness nature, and to the ability of each engine to operate at all times from a single tank or source which is automatically replenished if fuel is also stored in other tanks.
(4) The degree and duration of concentrated mental and physical effort involved in normal operation and in diagnosing and coping with malfunctions and emergencies.
(5) The extent of required monitoring of the fuel, hydraulic, pressurization, electrical, electronic, deicing, and other systems while en route.
(6) The actions requiring a crewmember to be unavailable at his assigned duty station, including: observation of systems,

emergency operation of any control, and emergencies in any compartment.

(7) The degree of automation provided in the aircraft systems to afford (after failures or malfunctions) automatic crossover or isolation of difficulties to minimize the need for flight crew action to guard against loss of hydraulic or electric power to flight controls or to other essential systems.

(8) The communications and navigation workload.

(9) The possibility of increased workload associated with any emergency that may lead to other emergencies.

(10) Incapacitation of a flight crewmember whenever the applicable operating rule requires a minimum flight crew of at least two pilots.

(c) Kind of operation authorized. The determination of the kind of operation authorized requires consideration of the operating rules under which the airplane will be operated. Unless an applicant desires approval for a more limited kind of operation. It is assumed that each airplane certificated under this Part will operate under IFR conditions.

ORAL ARGUMENT SCHEDULED FOR
SEPTEMBER 13, 2004

No. 03-1386

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

DALLAS E. BUTLER, *et al.*,

Petitioners,

v.

FEDERAL AVIATION ADMINISTRATION,

Respondent.

ON PETITION FOR REVIEW FROM AN ORDER
OF THE FEDERAL AVIATION ADMINISTRATION

FINAL REPLY BRIEF FOR PETITIONERS

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June 11, 2004

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[1] Petitioners do not designate any "principal authorities" for purposes of this Brief.

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GLOSSARY

ALPA	Airline Pilots Association
APA	Administrative Procedure Act
AsMA	Aerospace Medical Association
FAA	Federal Aviation Administration
NIH	National Institutes of Health
PPF	Professional Pilots Federation
SWAPA	Southwest Airline Pilots Association

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FEDERAL AVIATION ADMINISTRATION,

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ON PETITION FOR REVIEW FROM AN ORDER
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FINAL REPLY BRIEF FOR PETITIONERS

SUMMARY OF THE ARGUMENT

In its Brief, the Federal Aviation Administration (FAA) claims that: (1) the FAA enjoys immunity from judicial review; (2) a new expansion of *res judicata* denies the right to request exemptions under a concededly valid regulation; and (3) knowingly basing the unwritten no-exemptions policy on false data is irrelevant.

This Court must find, however, that: (1) no agency is above the law; (2) the petitioners should have their day in court; (3) an administrative decision based on deliberate

distortion does not warrant the Court's deference; and (4) an outdated stereotype of individuals fifty-nine years and older should not deny the most experienced, safest pilots the opportunity to continue their profession.

ARGUMENT

I. THE FAA'S CLAIM OF IMMUNITY FROM MANDATES UNDER THE INFORMATION QUALITY ACT LACKS A LEGAL BASIS.

The FAA's brief contends that the pilots' Information Quality Act (Act), Pub. L. No. 106-554, §515 (2001), argument "may not be raised here." (FAA Initial Brief ["FAA Brief"] at 40-41). Without citing any authority, the FAA claims that arguments about the Act are irrelevant concerning an exemption petition. Id. The FAA brief falsely states that the pilots failed to raise this issue before the agency. Id. In fact, the pilots' timely second amendment to the exemption petition explicitly stated that evidence existed that the FAA violated the Act. *J.A. 180* (Pet. 2d Amend.).

The FAA says its refusal to repeal the age rule does not violate the Act. (FAA Brief at 20). But repeal is not the issue. Rather, the FAA brief fails to address the pilots' argument - that the FAA based its denial of their exemption petition on data that does not meet the Act's standards. The FAA unlawfully relied on known falsified data - the antithesis of the information quality standards the Act mandates. (Pilots' Brief ["Br."] at 6-7, 11-19). *See* 67 Fed. Reg. §§ 8455-8459 (Feb. 22, 2002).

Again, without citing authority, the FAA states that anyone objecting to supporting government data must comply with the administrative mechanisms under the Act and its guidelines. (FAA Brief at 41). The FAA also claims, without authority, that one cannot raise any objections to government actions on judicial review. (FAA Brief at 20-21).

Then, the FAA goes further, asserting that the Act's guidelines do not support judicial review of agency action, even under those administrative mechanisms. (FAA Brief at 41). This argument is not the issue; however, the FAA's commentary is revealing because it amounts to a sweeping argument against judicial review. This position is not defensible. When an agency's dissemination of questionable data is harmful, those harmed are entitled to their day in court. *See* Tozzi v. U.S. Dept. of Health and Human Services, 271 F.3d 301, 307 (D.C. Cir. 2001).

The FAA claims it had no duty to consider the Act and its guidelines when denying the exemptions requested here. (FAA Brief at 40). This claim fails. The Act and its guidelines were the law of the land when the FAA denied the pilots' petition based on concededly distorted data. The FAA brief relies upon the Department of Transportation (DOT) website, stating that the Act's guidelines are merely policy views, and not legally binding. (FAA Brief at 41 n. 22). The FAA, however, ignores the mandate to follow its guidelines. 67 Fed. Reg. 8455-8459 (Feb. 22, 2002). (Br. at 8).

As the United States Supreme Court held in an analogous context: "So long as this regulation is extant, it has the force of law," and "the Executive Branch is bound by it." U.S. v. Nixon, 418 U.S. 683, 695 (1974).

The regulations under the Act prohibit an "Agency's default method of inferring risk...for which it has no adequate data." Chlorine Chemistry Council v. E.P.A., 206 F.3d 1286, 1287 (D.C. Cir. 2000). After all,

> ...the Act states unequivocally that "to the degree that an Agency action is based on science, the Administrator shall use...the best available, peer-reviewed science and

> supporting studies conducted in accordance with sound and objective scientific practices."

Id. at 1290. 42 U.S.C. § 300g-1(b)(3)(A).

It is a fundamental concept in American law that evidence based on distortion and falsehood is not scientific. "The adjective 'scientific' implies a grounding in the methods and procedures of science." Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 590 (1993). The FAA's misinformation about pilots over age 59 does not comply with the Act's mandates.

II. A PRIOR CASE UPHOLDING THE AGE RULE DOES NOT CREATE *RES JUDICATA* OR *COLLATERAL ESTOPPEL* CONCERNING CONSIDERATION OF EXEMPTIONS FROM THIS RULE.

A. *Res Judicata.*

The FAA claims *res judicata* bars consideration of this appeal, based on PPF v. FAA, 118 F.3d 758 (D.C. Cir. 1997). (FAA Brief at 26). That case upheld the FAA's denial of a petition for rulemaking seeking outright recision of the age rule. The instant case, however, does not attack the rule's validity, but challenges the denial of exemptions. Therefore, PPF v. FAA does not bar this action.

The FAA relies upon Cromwell v. County of Sac, 94 U.S. 351, 353 (1876), for its *res judicata* argument (FAA Brief at 26). Cromwell and its progeny, however, held that *res judicata* applies only when the same parties place the same demand or claim in controversy that the court has already decided.

Western Coal Traffic League v. ICC, 735 F.2d 1408, 1411 (D.C. Cir. 1984), does not support *res judicata*, (FAA Brief at 30). Under Western, judicial review is permissible

when the plaintiff distinguishes prior standard-setting and implementing precedent. Moreover, Cypress Emerald Resources Corp. v. Federal Mine Safety & Health Review Comm'n., 195 F.3d 42, 46 (D.C. Cir. 1999), which the FAA cites (FAA Brief at 34-35), nowhere addresses *res judicata*. Cypress concerned judicial interpretation of the Federal Mine Safety and Health Act of 1977 to determine if an agency action under this statute was appropriate. The Cypress decision has no bearing on whether *res judicata* precludes the pilots' appeal.

The FAA therefore misconstrues *res judicata* in the context of this case. Other decisions follow the Cromwell rule. "Res judicata...applies only to the ***same cause of action*** arising ***between the same parties***," Vallone v. C.I.R., 88 T.C. 794, 802 (1987). (Emphasis added.) "Under the doctrine of res judicata, a judgment on the merits in a prior suit bars a second suit involving the same parties or the privies based on the same cause of action." Parklane Hosiery Co., Inc. v. Shore, 439 U.S. 322, 327 no. 5 (1979).

The Professional Pilots Federation (PPF) support for the pilots' case does not bar this Court from considering the exemption requests on the merits. Even if the Court somehow deemed petitioners as "privies" for PPF, the cause of action is not the same. Exemption is not recision. Cromwell and its progeny do not apply to this case.

B. *Collateral Estoppel.*

The FAA cites Yamaha Corp. v. U.S., 961 F.2d 245, 254 (D.C. Cir. 1992), to support its *collateral estoppel* argument. (FAA Brief at 27). Yamaha, however, held that *collateral estoppel* applies only when the same parties raise the same factual issue which a court has already decided. Therefore, as the United States Supreme Court has held, *collateral estoppel* does not bar litigating "points which were

not at issue in the first proceeding." C.I.R. v. Sunnen, 333 U.S. 591, 598 (1948). No court has decided the exemption question in this case. Yamaha cannot control here.

The FAA claims that permitting exemptions would, in effect, repeal the age rule. (FAA Brief at 25 n. 8). Such is not the case. This Court can act without invalidating the age rule. The Court may determine whether to: (1) grant the exemptions for any or all of these petitioners, ages 57 to 67; (2) require additional medical or performance tests for pilots of a specific age; (3) remand the case for further factfinding under a special master; or (4) make such other ruling as the Court considers lawful and in the public interest.

Thus, neither *res judicata* nor *collateral estoppel* applies when the parties and issues are not identical to those in a prior case. *See* National Ass'n of Broadcasters v. F.C.C., 554 F.2d 1118, 1122-24 (D.C. Cir. 1976). The petitioners here are pilots who have never been parties in prior litigation concerning either the regulation or the no-exemptions policy.

C. The Fabricated Evidence from the FAA Files.

The FAA claims the pilots may not use the evidence obtained from formerly secret agency files because this evidence existed when the courts decided prior cases concerning the age rule. This argument makes no sense. The pilots obtained these "secret" files from Samuel D. Woolsey, an aviation law scholar, not a party to any of the previous actions.

Contrary to the FAA's assertion, petitioners did not waive these claims by failing to raise them during the administrative process. This Court held in Communities Against Runway Expansion v. FAA, 355 F.3d 678, 686 (D.C. Cir. 2004), that, "Under 49 U.S.C. 46110(d), we may consider

objections not raised during the administrative proceeding if there was 'reasonable ground' for the omission." Such a "reasonable ground" exists in this case. The pilots could not raise the claim that the FAA intentionally relied on false data until they gained possession of such evidence in these hidden files.

The FAA asserts that it cannot grant these exemptions because the agency has never done so before. (FAA Brief at 35-37). There is, however, no legal bar to permitting these exemptions. When denying a pilot's exemption request 25 years ago, the Tenth Circuit noted, "We do not suggest that the FAA could not, at some future time, be capable of abusing its discretion by adhering to its policy of nonexemption from the Age 60 Rule." Gray v. FAA, 594 F.2d 793, 795 (10th Cir. 1979).

III. THE FAA MISSTATES THE LAW CONCERNING DE NOVO REVIEW AND FAILS TO RECOGNIZE THAT COURT DEFERENCE DOES NOT APPLY TO AUTOMATIC EXEMPTION DENIALS BASED ON MISREPRESENTATION.

The FAA claims 5 U.S.C. § 706(2)(F) does not permit de novo review unless another statute specifically authorizes it. (FAA Brief at 38). The Supreme Court has held to the contrary:

> The question is phrased in terms of "prohibition" rather than "authorization" because a survey of our cases shows that judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress.

Abbott Laboratories v. Gardner, 387 U.S. 136, 140 (1967).

As the high court explained,

> ... the Administrative Procedure Act ... embodies the basic presumption of judicial review to one "suffering legal wrong because of an agency action, or adversely affected by an agency action within the meaning of a relevant statute," 5 U.S.C. § 702, so long as no statute precludes such relief or the action is not one committed by law to agency discretion, 5 U.S.C. § 701(1). The Administrative Procedure Act provides ... for review of "final agency action for which there is no other adequate remedy in a court," 5 U.S.C. § 704.

Id.

This Court's "substantial evidence" review relies on "judicially manageable standards." Steenholdt v. F.A.A., 314 F.3d 633, 638 (D.C. Cir. 2003). *See* Lincoln v. Vigil, 508 U.S. 182, 193 (1993) ("Congress may always circumscribe agency discretion ... by putting restrictions in the operative statutes...."). Useful standards "may be found in ... policy statements and regulations as well as statutes." Padula v. Webster, 822 F.2d 97, 100 (D.C. Cir. 1987). The pilots cite standards from the Federal Aviation Act, 49 U.S.C. §§ 40101 and 44701; Federal Air Regulations, 14 C.F.R. 1161(b), 11.81(d), (e); the FAA Safety System Handbook (Br. at 12-13); the Information Quality Act, Pub. L. No. 106-554, § 515 (2001); and Information Quality Regulations, 67 Fed. Reg. 8455 (Feb. 22, 2002). This authority constitutes "judicially manageable standards."

Congress intended that the APA "cover a broad spectrum of administrative actions, and this Court has echoed that theme by noting that the Administrative

Procedure Act's 'generous review provisions' must be given a 'hospitable' interpretation." Abbott Laboratories, 387 U.S. at 140-141. *See also* Board of Governors of Federal Reserve System v. Agnew, 329 U.S. 441, 444 (1947); Brownell v. We Shung, 352 U.S. 180, 255-256 (1956); and Rusk v. Cort, 369 U.S. 367, 379-380(1962).

The reviewing court must examine the real evidence.

> Judicial review of an agency action requires ... a "searching and careful" inquiry.... [T]he depth must be sufficient for us to be able to comprehend the agency's handling of the evidence cited or relied upon.

Center for Auto Safety v. Peck, 751 F.2d 1336, 1373 (D.C. Cir. 1985).

The FAA's objection to de novo review misses the point that agency misrepresentation of data fails the "substantial evidence" test. Without substantial evidence, an agency decision is arbitrary and capricious. Under this standard,

> ... the agency must examine the relevant data and articulate a satisfactory explanation for its action including "a rational connection between the facts found and the decision made."

Communities Against Runway Expansion, 355 F.3d at 685. *See also* Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mutual Automobile Ins. Co., 463 U.S. 29, 43(1983).

The FAA acted arbitrarily and capriciously, with no intention of following the statutory purpose to grant exemptions that serve the public interest. *Compare* U.S. Air

Tour Ass'n. v. FAA, 298 F.3d 997, 1003 (D.C. Cir. 2002) ("We agreed that it would be arbitrary and capricious for the government not to intend to achieve the congressional goal on any timetable at all.") *See* 49 U.S.C. §§ 40101, 44701.

The FAA's reliance on falsified age-safety data does not constitute a reasoned analysis. *See* U.S. Air Tour Ass'n. 298 F.3d at 1008 ("The principal question for us is whether the agencies' explanation of the model's assumptions and methodology is reasonable.").

The FAA cites National Mining Ass'n. v. Dept. of the Interior, 70 F.3d 1345 (D.C. Cir. 1995), to support its "arbitrary and capricious" theory. (FAA Brief at 35). National Mining, however, does not apply. National Mining involved a petition to repeal a government regulation, not a petition requesting the agency to take action pursuant to that regulation. The issue in National Mining was rulemaking. The issue here is implementing the rule.

The FAA cites cases that rejected challenges to mandatory retirement schemes. (FAA Brief at 39). The agency's reliance on those cases is inapposite because the pilots are not challenging a retirement plan. Rather, the pilots request exemption from a regulation forcing them to change jobs within the airline industry. The pilots' objective is to ensure a fair regulatory scheme. The pilots challenge the FAA's unwritten policy of automatically denying all age exemption requests. Again, requesting exemption for particular individuals does not constitute requesting repeal of the regulation that permits exemptions.

The FAA argues that, in the past, the courts have upheld exemption denials. In those cases, however, the courts presumed that the FAA based the age policy on authentic safety data. The evidence from the secret FAA files refutes this premise. (Br. at 14-15.) Basing a regulatory

decision upon falsehoods fails the "substantial evidence" test. This Court should apply de novo review.

IV. THE FAA FAILS TO REFUTE THE PILOTS' ARGUMENT THAT ITS POLICY DENYING ALL AGE EXEMPTION REQUESTS DOES NOT ARISE FROM SAFETY CONCERNS.

The FAA denies, but cannot refute, the documentary evidence proving that FAA officials created the no-exemptions policy as a favor to the airlines, the industry the FAA regulates. (FAA Brief at 27). *J.A. 85-107, 150-151, 156-161, 166-175 (*Pet. Exhibits B, C, Q, U, CC, EE, FF).

According to the FAA, flight simulators alone cannot ensure pilot safety (FAA Brief at 36). The FAA, however, does not and cannot deny that simulators, aircraft engineering, continued performance monitoring, frequent medical screening, multi-pilot crews, and fail-safe cockpit communications improve safety, regardless of the pilots' ages.

The FAA does not provide evidence of a single accident or injury over the past half-century attributable to age-related medical concerns. The FAA also fails to rebut its own officials' sworn testimony that incapacities exist regardless of age. (FAA Brief at 13). *J.A. 56-58* (Pet. 49-51).

The FAA brief mischaracterizes the NIH study, which disproved the prior data on which the FAA relied. (FAA Brief at 3-4). *See also J.A. 32-35* (Pet. 25-28). The FAA also fails to justify the false age-safety statistics that it relied upon, *J.A. 37-43, 64-72* (Pet. 30-36, 57-65), and refuses to admit that the valid data in its possession proved there is no basis for denying age exemptions. *J.A. 32-36, 48-56* (Pet. 25-29, 41-49). *See* U.S. Air Tour Ass'n., 298 F.3d at 1018 ("Although we might ordinarily defer to the FAA's expert assurance ... we cannot defer when the government's own

data suggests the contrary.") *See also* Public Citizen Health Research Group v. Tyson, 796 F.2d 1479, 1507 (1986) (where the agency "... has 'entirely failed to consider an important aspect of the problem,' we cannot find substantial evidence.")

The FAA claims it did not refuse to collect and analyze relevant pilot age-safety data, yet admits the studies it sponsored and relied upon never examined whether pilot performance caused accidents. (FAA Brief at 10).

The FAA claims that the principle of "evenhandedness" requires denying all exemptions. (FAA Brief at 25 n. 8). This position is illogical. "Evenhandedness" mandates the FAA to give fit and healthy older pilots at least the same consideration that it gives younger pilots suffering from illness or alcoholism.

The FAA claims that the pilots cited no foreign cases. (FAA Brief at 38-39 n. 19). In fact, the pilots cited two Australian cases finding that the studies the FAA relied on did not provide a safety basis for the FAA age policy. *See J.A. 77* (Pet. at 70 n. 276).

Moreover, the FAA does not deny, nor even address, the pilots' evidence that the FAA's scientific studies lack credibility. (Br. at 13-17).

The FAA falsely claims the pilots provided no reasons for the requested exemptions, repeating the allegation in the agency decision. *J.A. 191* (Decision at 9). (FAA Brief at 21). The pilots refuted this claim (Br. at 14-15).

The FAA claim that the pilots did not provide any personal information other than names, addresses and ages, (FAA Brief at 2, 16, 17), and therefore "treat[ed] themselves as irrelevant," (FAA Brief at 19), is simply meaningless. In

fact, the FAA possesses extensive information about all the pilots, but cannot find any data to rebut the facts supporting the exemptions.[1]

The pilots' exemption petition provided additional information about these particular pilots, explaining that the pilots: (1) would suffer irreparable harm if denied exemptions, *J.A. 9* (Pet. at 2); (2) desired to continue to serve as commercial airline pilots, *J.A. 10* (Pet. at 3); (3) could demonstrate that their continued piloting would serve the public interest and comply with air safety, *J.A. 10* (Id.); (4) met all applicable safety and performance standards, *J.A. 74* (Pet. at 67); and (5) are among the most experienced and safest pilots in the industry. *J.A. 83* (Pet. at 76). Again, the FAA does not rebut this information - it ignores it.

No statute or regulation supports the FAA's claim that an exemption petition without "medical data/protocol" prohibits consideration. Essentially, the FAA demands that the pilots provide a medical prognosis predicting with certainty whether a pilot ever will become ill. (FAA Brief at 23). This requirement is unreasonable.

> Of course, it would be unreasonable to conclude that the subject of scientific testimony must be "known" to a certainty; arguably, there are no certainties in science.

Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 590 (1993).

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[1] The FAA argues that the Court cannot consider Captain Michael L. Oksner's medical records, contained in the *amicus* brief by the Southwest Airlines Pilots Association (SWAPA), because these records were not part of the original exemption petition. (FAA Brief at 23 n. 7). *See also* SWAPA *amicus* at 6-7. This argument disregards the function of an *amicus* brief, which is to present another aspect of the case.

The FAA concedes that its decision erred in claiming that the pilots said there is a current pilot shortage. To recoup, the FAA claims, deceptively, that the pilots did not explain why the age rule would cause a future pilot shortage. (FAA Brief at 38). But the pilots, citing Senator John McCain and other sources, did explain this contention. *J.A. 78-79* (Pet. 71-72). The current pilot surplus is temporary. The need, however, for the most experienced military and civilian pilots in case of air emergency is long-term, especially in these times of terrorist threats.

The FAA argues that the pilots cannot cite an Aerospace Medical Association (AsMA) paper published after the agency ruled on the petition. (FAA Brief at 34 n. 16). The AsMA paper is permissible as evidence because it documents all known medical and safety data, up to the date of the FAA decision, as well as beyond. The FAA objects to inclusion of this paper because it does not support an automatic age cutoff. Moreover, this objection to the AsMA paper is fatuous because the FAA also cites documents dated after its ruling, notably a 2004 DOT website posting (FAA Brief at 41 n. 22).

The pilots also refuted, in their first brief, the FAA contention in its decision, *J.A. 194, 216* (Dec. at 12, 34), that the pilots' evidence is more than a decade old. (Br. at 15). The FAA's repeating this discredited claim does not make it any the more true. (FAA Brief at 18, 20, 34, 37).

There is no safety basis for the FAA's denial of exemptions here.

CONCLUSION

In light of the above, the Court should order the FAA to grant the exemptions that Dallas E. Butler and the 11 other named pilots have requested.

If, however, the Court decides to remand the case, it should order supervision by a special master to ensure the integrity of further administrative proceedings as may be necessary.

Respectfully submitted,

March 21, 2004 /s/

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Revised with
Joint Appendix Citations June 11, 2004

CERTIFICATE OF COMPLIANCE
LENGTH OF BRIEF

I am a member of the Bar of this Court and serve as Attorney for Petitioners in this case. I certify the foregoing Brief contains 3,895 words according to the Corel WordPerfect 10 program used to prepare and revise this Brief, in compliance with FRAP Rule 32(a)(7)(C) and Circuit Rule 32(a)(3)(C).

May 21, 2004 /s/

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CERTIFICATE OF SERVICE

I certify that 2 copies of the foregoing *Final Reply Brief for Petitioners* has been served to the following Agency counsel for Respondent-Appellees by hand-delivery on June 14, 2004:

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ORAL ARGUMENT SCHEDULED FOR SEPTEMBER 13, 2004

No. 03-1386

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

DALLAS E. BUTLER, et al.,

Petitioners,

v.

FEDERAL AVIATION ADMINISTRATION,

Respondent.

ON PETITION FOR REVIEW FROM AN ORDER
OF THE FEDERAL AVIATION ADMINISTRATION

FINAL BRIEF FOR THE RESPONDENT

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

(A) PARTIES AND AMICI

Parties before Agency:

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Federal Aviation Administration

Parties in this Proceeding:

Except for the Federal Aviation Administration, Respondent, all parties, intervenors, and amici have been identified in the Brief for the Petitioners.

(B) RULINGS UNDER REVIEW

The petition for review seeks review of a order entitled "Denial of Exemption" issued by the Federal Aviation Administration on October 6, 2003, and announced at 68 Fed. Reg. 69761, 69764 (Dec. 15, 2003).

The order is found at pages 183 to 197 of the Joint Appendix.

(C) RELATED CASES

This case has not previously been before this Court or any other court. We are unaware of any related cases within the meaning of Circuit Rule 28(a)(1)(C).

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GLOSSARY

Abbreviation	Definition
ADEA	Age Discrimination in Employment Act
Age 60 Rule	14 C.F.R. 121.383(c)
ALPA	Air Line Pilots Association
APA	Administrative Procedure Act
FAA	Federal Aviation Administration

Flight Time Study	1983 accident study by Richard Golaszewski
Hilton Study	Hilton Systems, Inc., Age 60 Project: Consolidated Database Experiments
NIH	National Institutes of Health
PPF	Professional Pilots Federation
Rule or rule	Age 60 Rule, 14 C.F.R. 121.383(c)
SWAPA	Southwest Airlines Pilots Association

IN THE UNITED STATES COURT OF APPEALS
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No. 03-1386

DALLAS E. BUTLER, et al.,

Petitioners,

v.

FEDERAL AVIATION ADMINISTRATION,

Respondent.

ON PETITION FOR REVIEW FROM AN ORDER
OF THE FEDERAL AVIATION ADMINISTRATION

FINAL BRIEF FOR THE RESPONDENT

STATEMENT OF JURISDICTION

The Federal Aviation Administration (FAA) has the authority to issue "regulations in the interest of safety for the maximum hours or periods of service of airmen and other employees of air carriers" and to prescribe "minimum safety standards" for air carriers, 49 U.S.C. 44701(a)(4) & (b)(1), in light of "the duty of an air carrier to provide service with the highest possible degree of safety in the public interest." 49 U.S.C. 44701(d)(1)(A). The FAA may "may grant an exemption from a requirement of a regulation" if it "finds the exemption is in the public interest." 49 U.S.C. 44701(f).

The most important consideration in determining the public interest is the "assigning, maintaining, and enhancing [of] safety and security as the highest priorities in air commerce." 49 U.S.C. 40101(d)(1).

The FAA issued a final order denying the petitioners' petition for exemption from the "Age 60 Rule," 14 C.F.R. 121.383(c), on October 9, 2003. The petitioners filed their petition for review on October 30, 2003. The petition was timely, and this Court has jurisdiction under 49 U.S.C. 46110(a).

QUESTIONS PRESENTED

1. Whether the FAA properly denied the petition for exemption when the petitioners provided neither information about themselves that would justify an exemption from the Age 60 Rule nor a proposed medical protocol that would enable the FAA to assess the individuals' risks of incapacitation, but rather launched a generalized attack on the rule.

2. Whether the petitioners' challenge to the Age 60 Rule is precluded by res judicata or stare decisis in light of this Court's decision in Professional Pilots Federation v. FAA, rejecting a challenge brought by the organization that is behind the current litigation.

3. Whether the FAA's denial of the petitioners' request to repeal the rule satisfied the requirements of the Administrative Procedure Act.

4. Whether the Age 60 Rule violates equal protection, due process, or the Information Quality Act.

STATUTES AND REGULATIONS

A copy of statutes and regulations relevant to this case may be found in an addendum to this brief.

STATEMENT OF THE CASE

A. Nature of the Case.

Under 14 C.F.R. 121.383(c), pilots may not fly for commercial airlines once they have reached their 60th birthday. Seven years ago, this Court upheld the FAA's refusal to repeal this "Age 60 Rule" against a challenge by the Professional Pilots Federation (PPF), an organization dedicated to eliminating or amending the Age 60 Rule. Professional Pilots Fed'n v. FAA, 118 F.3d 758 (D.C. Cir. 1997). cert. denied, 523 U.S. 1117 (1998) (PPF). The current litigation, for which PPF itself claims responsibility, is a repeat challenge to that rule.

In June 2002, the original 10 pilots filed with the FAA what they called a petition for exemption from the Age 60 Rule. Rather than present evidence specific to themselves to support their claim for exemption, the petition, approximately 250 pages in length (including exhibits), mounted a frontal attack on the Age 60 Rule itself. Its central contention was that there was no medical or scientific basis for the rule and that the rule originated in 1959 as a favor for the first FAA Administrator's friend, the chairman of American Airlines.

In response to publication of a summary of the petition in the Federal Register, the FAA received more than 6,700 comments. On October 9, 2003, the FAA denied the petition, because the petitioners had provided no evidence about themselves justifying an exemption from the Age 60 Rule. The FAA also rejected their attack on the rule, in large

part because nearly all of the reasons given had been raised and rejected before by the FAA and by the courts.

The petitioners now seek review of the FAA's order.

B. Statutory and Regulatory Background and History of Age 60 Rule.

1. Congress has charged the FAA with "promot[ing] safe flight of civil aircraft in air commerce by prescribing," among other things, "regulations in the interest of safety for the maximum hours or periods of service of airmen and other employees of air carriers" and establishment of "minimum safety standards" for air carriers. 49 U.S.C. 44701(a)(4) & (b)(1). By statute, the FAA "shall carry out [such responsibilities] in a way that best tends to reduce or eliminate the possibility or recurrence of accidents in air transportation" and shall consider "the duty of an air carrier to provide service with the highest possible degree of safety in the public interest." 49 U.S.C. 44701(c) & (d)(1)(A) (emphasis added).

The FAA promulgated the Age 60 Rule in 1959 pursuant to that statutory mandate. The rule provides that "[n]o certificate holder may use," and "[n]o person may serve as," "a pilot on an airplane engaged in operations under [14 C.F.R. Part 121] if that person has reached his 60th birthday." 14 C.F.R. 121.383(c).[1] The FAA adopted this regulation because of concerns about the danger posed to the public if the pilot of a large commercial aircraft suddenly became incapacitated. See 24 Fed. Reg. 5248 (1959). In its original rulemaking, the FAA found "that there is a progressive deterioration of certain important

[1] Until 1995, Part 121 carriers were primarily those operating aircraft with a seating capacity of more than 30 passengers as commercial common carriers. See 14 C.F.R. 121.1(a)(5)(ii) (1995). Part 121 was amended in 1995, and certificate holders subject to Part 121 regulations are now described in 14 C.F.R. Part 119. See 14 C.F.R. 121.1(a).

[physiological] and psychological functions with age, that significant medical defects attributable to this degenerative process occur at an increasing rate as age increases, and that sudden incapacity due to such medical defects becomes significantly more frequent in any group reaching age 60." 24 Fed. Reg. 9767, 9767 (1959). It also found that such incapacity cannot be predicted accurately. Id. Because of the high risks at stake, FAA decided to prohibit persons from piloting large commercial aircraft after reaching age 60. Id. at 9768.

2. The Age 60 Rule was challenged soon after it was promulgated. In Air Line Pilots Ass'n, Int'l v. Quesada, 276 F.2d 892, 898 (2d Cir. 1960), finding "considerable support" for the rule, the Second Circuit upheld it as a reasonable exercise of the FAA's authority to protect the public safety. The court also held that the rule was properly issued in accordance with the requirements of the Administrative Procedure Act (APA). Id. at 896.

In 1970, the Air Line Pilots Association - which now supports the rule and opposed the exemption requests here at issue, see J.A. 209-29 (Comments of ALPA) - petitioned the FAA to revoke the Age 60 Rule. After informal public hearings, FAA denied the petition. This Court upheld the rule, concluding that the FAA's decision not to revoke it was not unreasonable, "[g]iven the inconclusiveness of appellants' evidence and the existence of contrary views." O'Donnell v. Shaffer, 491 F.2d 59, 63 (D.C. Cir. 1974) (footnotes omitted).

In 1979, Congress directed the National Institutes of Health (NIH), in consultation with the Secretary of Transportation, to conduct a study of the Age 60 Rule. Pub. L. No. 96-171, 93 Stat. 1285 (1979). Although NIH found "'no special medical significance to age 60 as a mandatory age for

retirement of airline pilots,'" it recommended retention of the rule because "there was still no 'medical or performance appraisal system that can single out those pilots who would pose the greatest hazard because of early, or impending, deterioration in health or performance.'" PPF, 118 F.3d at 761 (quoting Report of the National Institute on Aging, Panel on the Experienced Pilots Study 1 (August 1981)).

The NIH study also recommended that the FAA or another appropriate federal agency collect the medical and performance data necessary to consider changing the Age 60 Rule. In response to that recommendation, the FAA issued an advance notice of proposed rule-making in 1982, seeking public input and data on the effects of aging on pilot performance. 47 Fed. Reg. 29,782 (1982). The FAA proposed an eight-year experiment, using a select group of volunteer pilots who would continue flying until age 62 and would be subject to extensive quarterly testing. Id. at 29,783-84. After considering hundreds of comments, however, the FAA later withdrew the proposal. 49 Fed. Reg. 14,692 (1984). Among other things, the agency found no tests "that can adequately determine which individual pilots are subject to incapacitation" due to cardiovascular, cerebrovascular, or other disease. Id. at 14,693. The FAA therefore withdrew the proposal because, "in the absence of validly selective tests, there are not sufficient means for collecting quantitative medical and performance data on airline pilots over age 60 under conditions of actual operational stress and fatigue that do not introduce an unacceptable safety risk." Id. at 14,692; see also id. at 14,695.

The following year, Congress held a hearing on the Age 60 Rule. Age Discrimination and the FAA Age 60 Rule: Hearing Before the House Select Comm. on Aging, Comm.

Pub. 533, 99th Cong. (1985). The hearing, however, resulted in no legislative action to rescind or alter the rule.[2]

3. In the years following adoption of the Age 60 Rule, a number of pilots petitioned for individual exemptions from the rule. Under 49 U.S.C. 44701(f), the FAA may grant an exemption from any of its safety regulations and standards, if the agency "finds the exemption is in the public interest." A petitioner must show "why granting the exemption would not adversely affect safety" or how it would "provide a level of safety equal to that provided by the rule from which you seek the exemption." 14 C.F.R. 11.81(e). No petitioners were able to satisfy that burden, and, thus, FAA denied all exemption requests. The courts of appeals repeatedly upheld those decisions. See, e.g., Baker v. FAA, 917 F.2d 318 (7th Cir. 1990), cert. denied, 499 U.S. 936 (1991);[3] Keating v. FAA, 610 F.2d 611 (9th Cir. 1979); Gray v. FAA, 594 F.2d 793 (10th Cir. 1979); Rombough v. FAA, 594 F.2d 893 (2d Cir. 1979); Starr v. FAA, 589 F.2d 307 (7th Cir. 1978). The courts also held that the FAA's policy of

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[2] Although Congress has never taken action to change the rule, it has enacted special tax treatment for pilots affected by the rule, see 26 U.S.C. 415(b)(9), and, in 1996, it prohibited the National Transportation Safety Board (NTSB) from spending any funds to study the performance of pilots over age 60. See Department of Transportation and Related Agencies Appropriations Act of 1997, Pub. L. No. 104-205, § 345, 110 Stat. 2951, 2976 (1996). Two bills were introduced in 2001 that would have increased the age of 60 to either 63 or 65, but they were not enacted. J.A. 189 (Order at 7).

[3] In Aman v. FAA, 856 F.2d 946 (7th Cir. 1988), the court reviewed several exemption denials. While it upheld the FAA's conclusion that petitioners had not shown an effective protocol to screen out all increased risk of incapacitation, it remanded for a more detailed response to petitioners' claim that experience offsets undetected physical losses. Id. at 957. After the FAA responded, the matter returned to the court in Baker, which upheld the agency's denial of the exemptions. The petitioners in Aman also made allegations about the FAA's bad faith similar to those made in the present case. The court rejected those arguments. 856 F.2d at 954 n.7.

declining to grant exemptions from the Age 60 Rule was not an abuse of discretion. Yetman v. Garvey, 261 F.3d 664, 679 (7th Cir. 2001); Rombough, 594 F.2d at 897-900; Starr, 589 F.2d at 311-14.

4. In 1990, FAA contracted with Hilton Systems, Inc., for a study correlating accident data with pilot age and flying time. The final report, Age 60 Project: Consolidated Database Experiments (Hilton Study), was issued in March 1993. The report did not address any medical issues; rather, it analyzed existing data on accidents between 1976 and 1988 involving pilots engaged in Part 121 and other operations. The study found "'no hint of an increase in accident rate for pilots of scheduled air carriers as they neared their 60th birthday'" but recognized that, given the Age 60 Rule, there were no data available on scheduled air carrier pilots beyond age 60. The study saw a "'hint, and a hint only,'" of an increase in accident rates for general aviation pilots older than 63 years of age, to whom the Age 60 Rule does not apply, and therefore concluded that "'one could cautiously increase the retirement age to age 63'" for pilots engaged in Part 121 operations. 60 Fed. Reg. 65,977, 65,978 (1995). The Hilton Study disagreed with a 1983 accident study by Richard Golaszewski (often referred to as the Flight Time Study), which had concluded that there was a significant increase in accidents among pilots over age 60. See Baker, 917 F.2d at 320-21 (criticizing Flight Time Study as having "serious flaws" but upholding FAA's denial of exemptions).

Prompted by the Hilton Study, the FAA published a notice indicating that it was considering whether to initiate a rulemaking on the Age 60 Rule and inviting public comment and attendance at a meeting. 58 Fed. Reg. 21,336 (1993); 58 Fed. Reg. 33,316 (1993). The notice also solicited public input on a number of specific safety and economic issues. For example, it asked whether the Hilton Study

provided enough information to support a change in the Age 60 Rule, and, if not, what other areas require study; whether the number of individuals over 60 serving in the cockpit should be limited or their duties be restricted, if the maximum age for pilots were to be increased; and whether the FAA should impose additional training and medical and performance testing requirements on older pilots. 58 Fed. Reg. at 21,336-37. The FAA held two days of hearings and received over 3000 comments in response.

During the FAA's consideration of the Hilton Study, PPF filed a petition for rulemaking, seeking a repeal of the rule - an end to any retirement age for commercial airline pilots. Approximately 60 individuals and organizations filed comments, most supporting the petition. The FAA completed its consideration of the Age 60 Rule and PPF's petition in December 1995. The agency decided not to initiate a rulemaking to change or repeal the rule. 60 Fed. Reg. at 65,977. Based on the extensive record and known studies, FAA concluded that the "concerns regarding aging pilots and underlying the original rule have not been shown to be invalid or misplaced." Id. at 65,980.

The FAA recognized that there has been great progress in diagnosing and treating cardiac and cerebrovascular illness since the Age 60 Rule was first adopted. Nonetheless, it found that cardiovascular disease still rises in frequency with age, especially between ages 55 and 65, and remains the most frequent cause of death in pilots and the general population. Other conditions also increase or become more severe with age, such as cerebrovascular disease, endocrine dysfunction, neurological disorders, psychiatric diseases, and decline in sensory and motor functions. Id. at 65,980, 65,983. Most problematic, however, are the age-related impairment of cognitive function (e.g., attention span, language ability, visuospatial skills, memory) and the increasing incidence of

dementia (which is often characterized by subtle changes and sometimes can be confirmed only by autopsy) with age. Id. at 65,980-81.

Although the FAA's current medical certification procedures can identify those pilots most at risk for many medical problems, the FAA concluded that, based on the existing medical literature, it was not possible to screen pilots for all such adverse factors that increase with age. 60 Fed. Reg. at 65,981, 65,983. Likewise, it found that performance checks using simulators cannot detect early or subtle cognitive defects that may progress to errors in judgment, nor can they predict whether an individual pilot's performance will degrade in the future. Id. at 65,983. Thus, the FAA determined that, "[w]hile science does not dictate the age of 60 [for pilot retirement], that age is within the age range during which sharp increases in disease mortality and morbidity occur." Id. at 65,981. Given its statutory mandate to prescribe regulations that will assure "the highest possible degree of safety," 49 U.S.C. 44701(d)(1)(A), the agency concluded that the Age 60 Rule effectively limits "the increasing, unpredictable danger associated with aging" and "provides additional confidence in air transportation safety." 60 Fed. Reg. at 65,983.

The FAA also discussed several reports on pilot accident rates, including the Hilton Study, noting the conflicting conclusions of such reports. Id. at 65,981-82. The agency acknowledged the inherent flaws in all such analyses: they must use surrogate data because no pilots over age 60 may fly in Part 121 operations. Id. at 65,982. Further, the studies did not examine pilot performance as an accident cause, nor did they include incidents of pilot incapacitation that did not result in accidents. Id. at 65,983. In short, although "the studies all tend to support a regulatory age limit, they provide no consensus as to precisely what that age limit should be." Id. at 65,982.

Because of that lack of consensus, the FAA therefore determined caution was appropriate and declined to consider the Hilton Study as a basis for changing the Age 60 Rule. Id. at 65,983.

The FAA next considered the effect of older pilots' greater experience on their performance. While recognizing the value of experience, the agency concluded that "it does not offset all risks or decrements associated with aging. * * * Once a pilot achieves a certain level of expertise, additional flight time will not significantly improve pilot performance." Id. The FAA also rejected the notion that pilots who retire at age 60 are replaced by young, inexperienced pilots; rather, industry practice is to replace them with other pilots with substantial experience as first officers (co-pilots) and flight engineers. While recognizing that a number of pilots nearing age 60 have performed heroically in stressful circumstances, the FAA concluded that it could not make a decision about whether to change the safety-driven Age 60 Rule on the basis of such anecdotal evidence. Id.

Because the many comments submitted during the proceeding did not provide "additional facts or analysis sufficient to support changing the rule," and the FAA's "overriding regulatory concern is safety," the agency decided not to initiate a rulemaking to change the Age 60 Rule, id. at 65,985, and denied PPF's petition to repeal the rule, id. at 65,979. The agency also denied pending petitions for individual exemptions from the Age 60 Rule. Id. at 65,979-80. In that connection, the FAA pointed out that "no petitioner has submitted a protocol, nor is the FAA aware of a protocol, that would permit the FAA to adequately assess an aging individual's relative risks of incapacitation, either sudden or subtle." Id. at 65,980. The agency also explained that it would summarily deny any future petition for exemption "unless it contains a proposed technique, not

discussed in this Disposition, to assess an individual pilot's abilities and risks of subtle and sudden incapacitation." Id.

In 1995, while the FAA was analyzing the extensive record developed on the Age 60 Rule and considering whether to grant PPF's rulemaking petition, it initiated a separate proceeding, in which it proposed regulations requiring certain commuter airlines operating under 14 C.F.R. Part 135 to conduct their operations in accordance with the more restrictive requirements of 14 C.F.R. Part 121. 60 Fed. Reg. 16,230 (1995).[4] That rulemaking was prompted by, among other things, several recent accidents, increasing commuter traffic, and the NTSB's recommendation in 1994 that there should be the same level of safety for most airline passenger service. Id. at 16,231-33. Among the many changes proposed was the extension of the Age 60 Rule to pilots engaged in Part 135 operations. Id. at 16,237.

The day after its Age 60 Rule Disposition, FAA issued its final rule in the commuter operations proceeding. 60 Fed. Reg. 65,832 (1995). As proposed, the FAA extended the requirements of Part 121, including the Age 60 Rule, to Part 135 commuter operations conducting scheduled passenger operations in airplanes with 10 to 30 seats and in turbojet aircraft regardless of seating. See 14 C.F.R. 121.1(a); 14 C.F.R. 121.2(a).

5. PPF sought judicial review of the FAA's decision not to institute a rulemaking to relax or eliminate the Age 60 Rule. It argued that the rule violates the Age Discrimination in Employment Act (ADEA), 29 U.S.C. 621, et seq. This Court disagreed, holding that "[n]othing in the [ADEA] can plausibly be read to restrict the FAA from

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[4] Part 135 operations included scheduled passenger operations in aircraft with 30 seats or fewer, or 7500 pounds or less payload capacity. 14 C.F.R. 135.1(a)(3) (1995). Like Part 121, Part 135 operations are now described in 14 C.F.R. Part 119.

making age a criterion for employment when [the agency] acts in its capacity as the guarantor of public safety in the air." PPF, 118 F.3d at 763.[5]

This Court also rejected PPF's various arguments that the FAA's decision was arbitrary and capricious in violation of the APA. For example, the Court agreed with the FAA that "[t]here are no tests * * * that can accurately determine the risk of an apparently healthy but older pilot suddenly being stricken by any one of the many potentially disabling conditions that may accompany advancing age," and that "even state-of-the-art testing cannot screen out potentially risky pilots." Id. at 765. The Court thus concluded that the "FAA afforded adequate consideration to the alternative of individualized testing." Id. It also held that it is "not unreasonable for the FAA to allow younger pilots with particular medical conditions to continue flying while, at the same time, not allowing pilots over the age of 60 to do so." Id. The Court accepted the FAA's explanation that "there are techniques for monitoring the health of pilots with certain medical conditions but that there is not yet any way of predicting whether and when an older pilot is likely to develop a condition with a potentially serious impact upon his ability to fly an airplane safely." Id. at 767.

Finding no merit to any of PPF's other arguments, this Court held that the FAA's decision not to initiate a rulemaking to revise the Age 60 Rule was not arbitrary or capricious. Id. at 770.

6. In April 2000, Bert Yetman, the president of PPF, and 68 other pilots - including 9 of the 12 petitioners in

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[5] Not long after PPF was decided, the Sixth Circuit held that the Age 60 Rule is a "bona fide occupational qualification reasonably necessary to the normal operation of an [air carrier's] business." Coupé v. Federal Express Corp., 121 F.3d 1022, 1023 (6th Cir. 1997), cert. denied, 523 U.S. 1020 (1998).

this case - petitioned the FAA for exemption from the Age 60 Rule to allow them to fly commercial aircraft after their 60th birthdays. The FAA denied the petition, stating that the petitioners had failed to satisfy their burden of showing that the exemptions were "in the public interest," 49 U.S.C. 44701(f), or that they were different from other pilots. After the petitioners filed a petition for review in the Seventh Circuit, the FAA obtained a remand from the court, published a notice of the petition and invited public comment. 65 Fed. Reg. 59,496 (2000).

Following the comment period, the FAA again denied the exemptions.[6] While the pilots had submitted a protocol, under which they would be examined by a panel of experts they selected, the FAA found the protocol to be almost identical with that supporting the exemption petitions that were at issue in two earlier cases. The only relatively new test in the protocol was the CogScreen Aeromedical Edition (CogScreen-AE), a battery of tests used by the FAA to screen an airman with known or suspected neurocognitive or psychiatric conditions. But the FAA noted that although this test was promising, there was insufficient evidence of the ability of the test to evaluate age-related factors affecting pilot performance. See Yetman, 261 F.3d at 673-74.

The FAA also explained that the medical examination portion of the protocol was essentially the same as that found insufficient in Aman v. FAA, 856 F.2d 946 (7th Cir. 1988), and that there was nothing since then to show that the protocol had greater predictive value. The pilots had argued that, if younger pilots with various medical conditions can be evaluated and issued medical certificates, older pilots can be evaluated as well, but the FAA was not persuaded. When medical conditions have been clearly

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[6] The order is available at http://dmses.dot.gov/docimages/pdf57/118577_web.pdf.

identified, they can often be adequately monitored, but there were no medical tests that could adequately determine which individual pilots were subject to incapacitation as a result of either acute cardiovascular or neurological events or to more subtle adverse conditions related to decline of cognitive functioning. See Yetman, 261 F.3d at 675-76.

In addition, the FAA rejected the pilots' argument based on the standards of other countries permitting pilots to serve beyond age 60, noting that the international aviation community continues to believe that some age limit is appropriate, and age 60 is an advisable limit for many air carrier pilots. See id. at 670. Moreover, the FAA found no reliable data to support the pilots' claim that there is a shortage of experienced pilots resulting from the Age 60 Rule, adding that lowering a safety standard was not an appropriate means to address pilot shortages. See id. at 678 n.7.

The parties returned to the Seventh Circuit, which denied the petition for review. Noting that the petitioners had a "heavy burden" to show justification for an exemption from the Age 60 Rule, the court held that the FAA's explanation for treating foreign carriers and commuter airlines differently was rational, id. at 670-71, that it had previously rejected a challenge based on the FAA's policy of granting exemptions to younger pilots with known medical conditions, id. at 671-72, and that the FAA had rationally concluded that CogScreen-AE scores did not allow it to identify when a pilot was incapable of safely operating an aircraft, id. at 673-76. In addition, the court held that the FAA's awareness of deficiencies in the one of the studies it relied on - a deficiency the court was previously made aware of - did not affect the validity of the rule. Id. at 676-77. Last, the court agreed with the FAA that the alleged shortage in experienced pilots did not warrant reducing safety standards. Id. at 678 n.7.

C. Statement of the Facts and Prior Proceedings.

The petitioners here, pilots for commercial airlines, filed a petition for exemption from the Age 60 Rule in June 2002. The petition was directed entirely at the validity of the rule itself; nothing in it suggested that the petitioners were in any way unique. Indeed, the petition provided no specific information about the petitioners, other than names, addresses, and birth dates. J.A. 8-9 (Pet. 1-2).

The principal arguments raised in the petition were these: The rule was issued originally as a favor for the chairman of American Airlines, as a matter of economic favoritism, and the FAA has misrepresented the safety basis for the rule from the outset. J.A. 13-29 (Pet. 6-22). The FAA has refused from the beginning to collect and analyze data to determine whether the rule is justified. J.A. 29-43 (Pet. 22-36). The FAA has disseminated false and misleading data. J.A. 44-48 (Pet. 37-41). Pilot incapacitation has never justified the rule, because fail-safe measures have existed for many years. J.A. 48-56 (Pet. 41-49). The FAA has failed to consider that performance and medical checks prevent the feared risks. J.A. 56-61 (Pet. 49-54). FAA officials privately admit that the purpose of the rule is economic, and the studies relied on by the FAA are flawed. J.A. 61-73 (Pet. 54-66). The petition also alleged that the rule was discriminatory in violation of the Age Discrimination in Employment Act, as well as violating due process and equal protection, J.A. 74-77 (Pet. 67-70), and that an exception to the rule would curb a shortage of commercial pilots that has resulted in recruitment of military pilots and pilots from regional and charter lines. J.A. 78-81 (Pet. 71-74).

The FAA published two summaries of the petition in the Federal Register for public comment, 67 Fed. Reg. 57,478 (2002); 67 Fed. Reg. 61,948 (2002), and received more than 6,700 comments, the "overwhelming majority" of which

supported retention of the rule. J.A. 186 (Order at 4). October 9, 2003, the FAA denied the petition, because the petitioners had failed to show that "circumstances justify exemptions from the Age 60 rule, a heavy burden where daunting issues of public safety are implicated." J.A. 191 (Order at 9). Noting that the only information provided about the petitioners was their names, addresses, and birth dates, the FAA found that there were no facts uniquely qualifying these petitioners for an exemption to the rule. Id. The requirements for an exemption are not met by challenging the basis for the rule and the FAA's conduct in defending the rule. Id.

The FAA then responded to the attack on the rule, explaining that there was "no significant new information" supporting the "far-reaching theories" raised in the petition that was not presented in prior petitions, and that the FAA's actions on those prior petitions were upheld in the courts of appeals. Id. First, the FAA denied the allegations of economic favoritism, which had been presented in both PPF and Yetman and largely rejected in Aman. J.A. 192-93 (Order at 10-11). Second, the FAA denied that it refused to collect data on the matter, noting that Yetman had held to the contrary and that the FAA has posted various reports on the Age 60 Rule at its website. Id. Third, the petitioners' claim that the FAA misrepresented studies supporting the rule (including the Flight Time Study) was also rejected in Yetman. J.A. 193-94 (Order at 11-12). Fourth, the FAA had repeatedly considered the claim that pilot incapacitation does not pose a risk in light of safety measures, such as multiple-pilot crews, and its decision that an unacceptable risk remains was upheld in Yetman. The evidence relied on by the petitioners here was "no less than a decade old." J.A. 194 (Order at 12). Fifth, the FAA had found that medical tests and protocols submitted in earlier proceedings did not provide the same level of safety as the Age 60 Rule (upheld in Aman, Baker, and Yetman), and these petitioners had

submitted "no medical protocol whatsoever." J.A. 194-95 (Order at 12-13). Sixth, the FAA once again ruled that simulators could not adequately screen at-risk pilots, a finding previously upheld in PPF. J.A. 195-96 (Order at 13-14). Seventh, responding to the claim that the FAA did not enforce the rule against foreign pilots, the FAA explained that, while the Age 60 Rule does not apply to Part 129, which governs foreign air carriers, it has "for quite some time now" insisted on compliance by foreign operators of '"large'" aircraft. J.A. 196 (Order at 14). Eighth, the FAA noted that both PPF and Yetman had held that the rule does not violate the ADEA. Id. Finally, the FAA stated that changing the rule would not have an impact on the number of pilots leaving military service or the number of pilots in the airline industry. J.A. 196-97 (Order at 14-15).

SUMMARY OF ARGUMENT

The petitioners' challenge here threatens a head-on collision with this Court's 1997 decision in PPF v. FAA, which upheld the FAA's refusal to repeal the Age 60 Rule.

Not content with the decision in PPF (or with the Seventh Circuit's similar decision in Yetman v. Garvey, in 2001), PPF, an organization established to fight the Age 60 Rule, has returned to this Court for yet another challenge to the rule. Rather than proceed by petition for rulemaking, as in PPF, PPF has found 12 pilots willing to seek an exemption from the rule. And rather than supplying the necessary medical information about themselves and proposing a medical protocol to support an exemption, those pilots have supplied only the most rudimentary, non-medical information, completely failed to offer any medical protocol by which the FAA could ascertain the individual pilot's abilities and risks of subtle and sudden incapacitation, and used the petition for exemption as a vehicle to attack the underlying rule all over again. The petitioners' decision to

treat themselves as irrelevant to the question of exemption makes sense only if one notices that counsel for the individual petitioners has told the FAA and the public he filed the petition for exemption on behalf of PPF, and that PPF itself not only takes responsibility for this litigation as its own but also openly solicited the pilots to participate in this litigation.

Thus, before the Court even reaches the petitioners' arguments about the Age 60 Rule, it should dispose of this case in either of two ways. The simpler and narrower way is to deny the petition for review on the ground that, as the FAA explained, the petitioners individually submitted no medical information about themselves and proposed no medical protocol. Without that information, an exemption could not be granted. Alternatively, the Court should treat this case as barred by res judicata, in that PPF seeks to relitigate the validity of the Age 60 Rule by using the petitioners as its surrogates. (At a minimum, this case is controlled by the decision in PPF as a matter of stare decisis.)

If, despite these two fundamental problems with the petitioners' case, the Court wishes to examine the decision not to repeal the Age 60 Rule, it should still deny the petition for review. It was not arbitrary or capricious for the FAA to deny the petition on the ground that the arguments raised in support of repealing the Age 60 Rule had been repeatedly presented to the FAA and the courts in the past. Nor had the petitioners submitted any new evidence; to the contrary, their evidence was at least a decade old.

Neither is there any merit to the petitioners' contention that the rule violates equal protection or due process. Mandatory retirement rules have been upheld by the Supreme Court in three separate cases.

Finally, the FAA's refusal to repeal the rule does not violate the Information Quality Act. Those who object to information and data used by the government must proceed by way of the "administrative mechanisms" set up under the statute and implementing guidelines. Objections may not be raised on judicial review of a disputed government action.

ARGUMENT

Standard of Review. In reviewing a petition for exemption from the Age 60 Rule, the Court does not "reexamine the validity of the [rule] itself, already affirmed as it has been." Yetman, 261 F.3d at 668-69. The petitioners have a "heavy burden" to justify their proposed exemption from the rule, because "safety is and must be the dominant consideration." Id. at 669. To the extent the rule itself is in issue, the Court "will defer to the FAA's decision[] to retain the [rule]," unless it is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. PPF, 118 F.3d at 763.

I. THE FAA PROPERLY DENIED AN EXEMPTION TO THE PETITIONERS, WHO FAILED TO PROVIDE ANY REASON THAT THEY AS INDIVIDUALS WERE ENTITLED TO AN EXEMPTION FROM THE AGE 60 RULE.

The petition for exemption filed by the petitioners provided no evidence or even a reason to support its claim that these 12 pilots individually were entitled to an exemption from an otherwise valid regulation. Instead, the petition mounted a direct, facial challenge to the validity of the regulation. The FAA was justified in denying them an exemption.

A. The FAA has statutory authority to grant an exemption from a regulation: "The Administrator may grant an exemption from a requirement of a regulation prescribed under subsection (a) or (b) of this section or any of sections 44702-44716 of this title if the Administrator finds the exemption is in the public interest." 49 U.S.C. 44701(f). A matter is in "the public interest" if, among other things, it involves the "assigning, maintaining, and enhancing [of] safety and security as the highest priorities in air commerce." 49 U.S.C. 40101(d)(1). Under the FAA's regulations, a person seeking to avoid application of a valid regulation in his own situation proceeds by petition for exemption; attacks on the validity of a regulation or requests for change in a regulation must proceed by petition for rulemaking:

> (a) Using a petition for rulemaking, you may ask FAA to add a new regulation to title 14 of the Code of Federal Regulations (14 CFR) or ask FAA to amend or repeal a current regulation in 14 CFR.
>
> (b) Using a petition for exemption, you may ask FAA to grant you relief from current regulations in 14 CFR.

14 C.F.R. 11.61. See Yetman, 261 F.3d at 668-69 (review of denial of exemption does not include "reexamin[ing] the validity of the Age Sixty Rule itself, already affirmed as it has been, or reweigh[ing] the evidence introduced before the FAA when the determination was made to keep the rule in force"); Keating, 610 F.2d at 612 ("[w]e need not reexamine the validity of the Age 60 Rule"); Rombough, 594 F.2d at 897 ("[n]or are we to re-examine the validity of the Age 60 Rule"); cf. Tribune Co. v. FCC, 133 F.3d 61, 69 (D.C. Cir. 1998) ("whether the Commission is obliged to reconsider its rule can be raised to this court only on review of a

Commission denial of a rulemaking petition"); Public Citizen v. NRC, 901 F.2d 147, 152 (D.C. Cir.), cert. denied, 498 U.S. 992 (1990) ("a claim that agency action was violative of statute may be raised outside a statutory limitations period, by filing a petition for amendment or rescission of the agency's regulations, and challenging the denial of that petition").

The FAA's regulations have "established a rigorous benchmark for proving that an exemption is in the public interest," Yetman, 261 F.3d at 668, in that the applicant must explain at least "why granting the exemption would not adversely affect safety, or how the exemption would provide a level of safety at least equal to that provided by the rule from which you seek the exemption." 14 C.F.R. 11.81(e). Indeed, in the context of the Age 60 Rule, the FAA announced when it denied PPF's petition for rulemaking in 1995 that it would summarily deny any future petition for exemption "unless it contains a proposed technique, not discussed in this Disposition, to assess an individual pilot's abilities and risks of subtle and sudden incapacitation." 60 Fed. Reg. at 65,980. The Seventh Circuit in Yetman upheld that "rigid policy" of denying exemptions until the FAA is satisfied that medical standards demonstrate "an absence of risk factors in an individual." 261 F.3d at 679 (emphasis added).

B.1. The only information about the individual petitioners contained in the petition for exemption filed in this case was the names, addresses, and dates of birth for the pilots. J.A. 8-9 (Pet. at 1-2); Br. 3. Unlike the petitioners in Yetman, who submitted "their complete medical records," 261 F.3d at 668, the petitioners here failed to submit medical

records at all.[7] Nor did they provide any new medical standards or protocols permitting an individual pilot's risk factors to be evaluated, J.A. 195 (Order at 13) ("no medical protocol whatsoever was submitted"), even though Yetman upheld the FAA's policy of requiring applicants for exemptions to provide such protocols, 261 F.3d at 679.

The record in this case is thus entirely barren of information and evidence that could conceivably support an exemption for any of the 12 petitioners. Accordingly, the FAA denied the petition for exemption, explaining:

> The only facts given concerning these petitioners are their names, birth dates, and addresses. Petitioners present no facts that uniquely qualify them for an exemption to the Age 60 rule as opposed to many similarly situated pilots. Without further medical information regarding these petitioners and without a medical protocol that can reliably predict which over age 60 pilot will experience detrimental age decrements, the petitioners have failed to present any evidence upon which an exemption might legitimately be based. * * * The petition is denied because the petitioners have failed to provide any information that supports an exemption from the rule.

J.A. 191 (Order at 9).

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[7] Southwest Airlines Pilots' Association (SWAPA), as amicus, argues that petitioner Oksner previously submitted his medical records in a different proceeding seeking an exemption, the denial of which was upheld in Yetman, SWAPA Br. 7, but SWAPA admits that he failed to submit them for the record in this case. Id. at 3. Since these medical records are not a part of the record here - and date from 1999 in any event, 3 years or more before the close of the record in this case - Oksner may not rely on them now.

2. The petitioners' only response is that this conclusion is "preposterous," and that they actually did provide "'information' substantiating exemption," Br. 13-14, namely "81 pages of factual narrative, 295 footnotes and 39 exhibits supporting exemption." Br. 14. But they do not point to a single portion of these materials relating specifically to any of the petitioners as individuals (other than names, addresses, and dates of birth). There is none. "[F]actual narrative," footnotes, and exhibits attacking the validity of the rule from which they seek exemptions have no bearing on whether such exemptions are warranted.

Given the complete failure of evidence in the petition, the FAA's denial of exemptions was not arbitrary or capricious. See Airmark Corp. v. FAA, 758 F.2d 685, 691 (D.C. Cir. 1985). Indeed, it was the only rational action to take on this record.[8]

II. THE CHALLENGE TO THE AGE 60 RULE IS CONTROLLED BY THIS COURT'S DECISION IN PPF.

Although the petitioners' failure to justify individual exemptions is enough to resolve this case, and it is not necessary for the Court to reach their broader challenge to the Age 60 Rule, we will address that challenge now.

This Court has already upheld the FAA's decision to keep the Age 60 rule in PPF (as has every other court to address the issue). Not only does this Court's decision in

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[8] If the FAA had granted the petitioners an exemption based on doubts about the validity of the Age 60 Rule and not on any evidence specific to them, "[e]lementary even-handedness," Airmark, 758 F.2d at 692, would have required the FAA to begin granting exemptions to everyone. In other words, granting the relief requested would have resulted in a de facto repeal of 14 C.F.R. 121.383(c) without notice-and-comment rulemaking. Repeal of the rule was beyond the scope of the Federal Register notice summarizing the petition for exemption.

PPF control here simply as a matter of stare decisis, but the matter is res judicata as well, given PPF's party status in the prior action and the substantial control that PPF exercises over the conduct of this litigation.

A. The Decision In PPF Is Res Judicata.

1. The doctrine of res judicata, or claim preclusion, prevents a second suit from being pursued by the same parties or their privies on the same cause of action on which judgment was based in a prior action. Montana v. United States, 440 U.S. 147, 153 (1979); Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326 n.5 (1979); Restatement (Second) of Judgments § 19 (1982) ("A valid and final personal judgment rendered in favor of the defendant bars another action by the plaintiff on the same claim.").

Res judicata is a bar not only to those grounds of recovery or defense that were actually litigated in the first action but also to "every ground which might have been presented." Cromwell v. County of Sac, 94 U.S. 351, 353 (1876). Res judicata serves the purpose of "protecting litigants from the burden of relitigating an identical issue with the same party or his privy and of promoting judicial economy by preventing needless litigation." Parklane Hosiery, 439 U.S. at 326. "'Courts today are having difficulty giving a litigant one day in court. To allow that litigant a second day is a luxury that cannot be afforded.'" National Treasury Employees Union v. IRS, 765 F.2d 1174, 1177 (D.C. Cir. 1985) (quoting C. Wright, Law of Federal Courts 678 (4th ed. 1983)).

2. Identity of Claim. Both PPF and this action involve the same cause of action or claim, namely, an action for judicial review of the FAA's refusal to repeal the Age 60

Rule.[9] The petitioners in both cases have argued that the rule is discriminatory - under the ADEA in PPF and under the equal protection clause here; that the rule lacks a safety basis; that the safety studies relied on by the FAA do not support the rule; that the FAA has refused to collect data to support the rule; and that other means exist to avoid the feared risks. Although the evidence submitted and the arguments made in the two cases differ to some degree, claim preclusion operates as a bar not only on arguments that actually were made in the first action but also on any argument that could have been made in the first action.[10]

The thrust of the petitioners' argument in this case is that the rule was never based on safety considerations. They insist that it originated in 1959 as a personal favor for C.R. Smith, the chairman of American Airlines, who wanted a rule to back up the company's desired policy of mandatory age-60 retirement for pilots. See, e.g., Br. 3, 6, 11, 14. They rely in large part on a February 5, 1959, letter from Smith to General Elwood Quesada, the head of the Federal Aviation Agency, the FAA's predecessor, and a second letter from Smith to Quesada dated April 30, 1959. J.A. 18-23 (Pet. 11-

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[9] The fact that the PPF action was a challenge to the denial of rulemaking, while this case is a challenge to the denial of exemptions for pilots, is irrelevant. As we have already shown, the petitioners here provided the FAA with no information about themselves that would justify an exemption; their argument was simply that the rule is invalid and should be repealed. For that reason, the cause of action is the same in the two cases.

[10] Cf. Yamaha Corp. v. United States, 961 F.2d 245, 254 (D.C. Cir. 1992), cert. denied, 506 U.S. 1078 (1993) (collateral estoppel applies even if party seeks to introduce new arguments in support of its position on the same issue, if those arguments could have been made in the first action); id. at 254-55 (preclusion cannot be avoided by offering evidence that was available at time of first action); Securities Indus. Ass'n v. Board of Governors, 900 F.2d 360, 364 (D.C. Cir. 1990).

16), 107, 130-32 (Pet. Exhs.C, J). But as the FAA noted in its order denying the exemptions, these documents and the theory that the rule originated in economic favoritism had been repeatedly raised in filings with the FAA and the courts of appeals.[11] J.A. 191-92 (Order at 9-10) Indeed, these very documents were included in the joint appendix in PPF, at pages 618, 626-27, and PPF cited them in its opening brief in that case, at page 4:

> In February 1959, Smith wrote a "Dear Pete" letter to Quesada, telling him that the Air Line Pilots' Union ("ALPA") had refused to agree to mandatory retirement at age 60 and suggesting that, "It appears obvious that there must be some suitable age for retirement." (JA 618.) This letter was followed by additional ex parte letters, some sent to the administrator's home, in which Smith lobbied for the FAA to set an age limit for pilots. (JA 619-27.).

Although PPF did not make the precise argument in PPF that the petitioners make here, PPF manifestly could have made that same argument based on the same evidence the petitioners rely on now, which was already available

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[11] Contrary to the petitioners' contention, Br. 11, the FAA did not simply rely on a union's assertion that the petition offered no evidence that the rule was a favor to airline executives. The FAA's statement at page 6 of the Order was part of a summary of the views of commenters, not a part of the agency's rationale for its decision. J.A. 188 (Order at 6).

then.[12] In fact, a decade before PPF, the petitioners in Aman v. FAA, supra, made just such an argument based on the Smith-Quesada letters. The Seventh Circuit expressly rejected both the "thinly veiled allegations that the FAA's position with respect to the fitness of pilots over sixty has been shaped by improper influences," including "ex parte communications between the FAA Administrator and the president of a major airline," and other conspiratorial arguments like the ones raised in this case: that "the FAA's loss of the original docket may have been intentional" and that the agency has a "hidden agenda - a concern for airline costs rather than for passenger safety." Aman, 856 F.2d at 954 n.7.

3.a. Identity of Parties. Res judicata applies when the two actions are litigated by the same parties or their privies. Although the matter is not free from doubt,[13] nonparties who control the litigation should be treated as if they were parties, just as they are in the collateral estoppel context. The reason for such a rule is that the interests protected by claim preclusion, like those protected by issue preclusion, "are similarly implicated when nonparties

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[12] The petitioners here assert that they have produced for the first time the so-called "lost" internal FAA docket on the original rule, Br. 12, 14, 16, but they concede that this docket became publicly available almost 20 years ago following litigation under the Freedom of Information Act. Br. 12. The petitioners' effort to explain away PPF and the other Age 60 decisions on the ground that they did not "present[] the docket evidencing agency misrepresentation and fraud as the instant case does," Br. 16, ignores the critical fact that this entire "lost" docket had been available for years at the time the PPF case was litigated.

[13] Dictum in Montana suggests that collateral estoppel, not res judicata, applies when one action is brought by a party and the other is brought by a person under the control of that party, Montana, 440 U.S. at 154, but it is "highly improbable" that this dictum "meant categorically to banish privity - a time-honored concept that collapses distinctions between form and substance in respect to party status - from use in conjunction with principles of res judicata." Gonzalez v. Banco Central Corp., 27 F.3d 751, 756-57 (1st Cir. 1994).

assume control over litigation in which they have a direct financial or proprietary interest and then seek to redetermine issues previously resolved." Montana, 440 U.S. at 154. A person "at whose direction a cause of action is litigated cannot be said to be '[a] stranger[] to the cause,'" and one "'who assists in the prosecution or defense of an action in aid of some interest of his own ... is as much bound ... as he would be if he had been a party to the record.'" Id. (quoting Souffront v. Compagnie des Sucreries, 217 U.S. 475, 486-87 (1910)); see also United States v. Rashed, 234 F.3d 1280, 1282-83 (D.C. Cir. 2000), cert. denied, 533 U.S. 924 (2001) ("In general, a party is in privity with another if it 'assume[d] control over litigation' by the other.") (quoting Montana, 440 U.S. at 154); AFGE, Council 214 v. FLRA, 835 F.2d 1458, 1462 (D.C. Cir. 1987) ("One who controls litigation, even if not named as a party, may be subject to collateral estoppel."); Ethnic Employees of Library of Congress v. Boorstin, 751 F.2d 1405, 1409 (D.C. Cir. 1985) (if EELC had "controlled the earlier litigation," that "could lead to the application of issue preclusion against it").

It has long been the rule that one who has "a laboring oar in a controversy" may be bound by the judgment. Drummond v. United States, 324 U.S. 316, 318 (1945). And a significant factor in binding a nonparty is whether it "employs counsel to represent its interest in a litigation or otherwise actively aids in its conduct." Id. This is particularly true in the case of an association and its members; when one action is pursued by an association and the other by members of that association, preclusion principles often apply. Utah Power & Light Co. v. ICC, 764 F.2d 865, 871 (D.C. Cir. 1985); Western Coal Traffic League v. ICC, 735 F.2d 1408, 1411 (D.C. Cir. 1984); Expert Electric, Inc. v. Levine, 554 F.2d 1227, 1232 (2d Cir.), cert. denied, 434 U.S. 903 (1977) ("one whose interests were adequately represented by another vested with the authority of

representation is bound by the judgment, although not formally a party to the litigation").

b. In this case, there is considerable evidence, including admissions by PPF, that PPF organized and controlled this litigation. To begin with, PPF, an organization established to fight the Age 60 Rule, openly treats this litigation as its own. PPF's April 2004 newsletter is headlined "PPF Brief Is Filed" and refers to "our" brief and "our" petition for exemption. http://www.ppf.org/newslet.htm (last visited on April 21, 2004). Similarly, PPF's March 2004 newsletter refers to counsel as "our lawyers," the petition for exemption filed with the FAA as "our petition," and the prospective oral argument date in this case as "a date for PPF to appear in court." Id. The December 2003 newsletter admits that PPF solicited the petitioners in this case; it thanks the "many volunteers answering our request for additional Petitioners." Id. Unsurprisingly, all 12 individual petitioners are members of PPF. According to the third amendment to the petition, filed with the FAA in August 2003, all ten original petitioners were members of PPF, J.A. 181 (Third Amdt. to Petition), and PPF's solicitation of additional petitioners - "Volunteers Needed" - required that any new petitioner be a paid-up member of PPF. http://www.ppf.org/newslet.htm (last visited on April 21, 2004) Moreover, three petitioners - Paul Turner III, Alan J. De Sa, and Philip N. Nash - are members of PPF's Board of Directors. http://www.ppf.org/whoweare.htm (last visited on April 21, 2004).[14]

Current counsel, Mr. Bothwell, was the attorney who filed the petition for exemption, and by his own statements, he filed it "as attorney for PPF." J.A. 198 (Sept. 12, 2002, letter

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[14] Nine of the 12 petitioners here also petitioned for exemptions in the Yetman case.

at 1) (referring to "the petition I filed (as attorney for PPF * * *) on behalf of ten pilots * * * requesting exemption from the age 60 rule"); J.A. 205 (Jan. 3, 2003, letter) (referring to "Professional Pilots Federation petition"). In other correspondence regarding the petition for exemption, Mr. Bothwell also identified himself as attorney for PPF. J.A. 201, 202, 208 (Oct. 1, 2002, letter; Oct. 26, 2002, letter; Jan. 6, 2003, letter). See also J.A. 196 n.32 (Order at 14) In addition, Mr. Bothwell's web site contains a news release dated September 11, 2002, in which he refers to the petition for exemption as "[a] petition I filed on behalf of the Professional Pilots Federation." http://www.apxbothwell.com/publications/newsletters/bothwell-vol-iv_no2.htm (last visited on April 21, 2004).

Given this evidence, the petitioners are bound by the judgment in PPF, because PPF is the "admitted mastermind" of this litigation. Alpert's Newspaper Delivery Inc. v. New York Times Co., 876 F.2d 266, 270 (2d Cir. 1989). Failure to apply preclusion principles here would open the door to perpetual litigation. As the Ninth Circuit explained in an analogous situation: "If the individual members of the Association were not bound by the result of the former litigation, the organization would be free to attack the judgment ad infinitum by arranging for successive actions by different sets of individual member plaintiffs * * *." Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 322 F.3d 1064, 1084 (9th Cir. 2003).[15]

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[15] That this is a serious risk is confirmed by the fact that PPF also took responsibility for filing the Yetman case on behalf of 69 individual pilots. Bert Yetman, the lead petitioner, was president of PPF, and several other petitioners were officers or directors of PPF. PPF's March 2001 newsletter (no longer on the website) described the brief due in the Seventh Circuit as "our" brief.

B. Stare Decisis Also Precludes Relitigation Of The Rule's Validity.

Even if this case is not barred under a strict reading of res judicata, the current challenge to the Age 60 Rule would require the Court to overturn its decision in PPF, which upheld the FAA's adherence to that rule. Ordinary principles of stare decisis and law of the circuit counsel against such a course.

It is, of course, a well established principle that one panel of the Court is bound by a decision of another panel. This "law-of-the-circuit doctrine is derived from legislation and from the structure of the federal courts of appeals." LaShawn A. v. Barry, 87 F.3d 1389, 1395 (D.C. Cir. 1996) (en banc). If adherence to circuit precedent were not required, "the finality of our appellate decisions would yield to constant conflicts within the circuit." Id. See also Ranger Cellular v. FCC, 348 F.3d 1044, 1049-50 (D.C. Cir. 2003) ("Once a panel of this court has decided a matter, subsequent panels are bound by that decision unless and until it is changed by the court en banc.").

In PPF, this Court held that the rule did not violate the ADEA. 118 F.3d at 763. It also rejected several arguments made by PPF in support of its contention that the FAA's decision not to repeal the rule was arbitrary and capricious. The Court agreed with the FAA that no tests can "accurately determine the risk of an apparently healthy but older pilot suddenly being stricken by any one of the many potentially disabling conditions that may accompany advancing age," and held that the "FAA afforded adequate consideration to the alternative of individualized testing." Id. at 765. The Court also held that it is "not unreasonable" to bar pilots from flying after age 60 even though the FAA allows younger pilots to continue flying despite particular medical conditions, id., because there may be ways of monitoring

the health of pilots with certain medical conditions but "there is not yet anyway of predicting whether and when an older pilot is likely to develop a condition with a potentially serious impact upon his ability to fly an airplane safely." Id. at 767. The Court also declined to require the FAA to follow the recommendation of the Hilton Study, id. at 769, or to require it to collect data by allowing some pilots to fly past age 60; the Court observed that it was not unreasonable for the FAA to say it lacked data even though the lack of data was the result of the rule, given that "the FAA was justified in imposing the Rule in the first place." Id. at 770.

The petitioners here fail to confront this Court's holding in PPF, let alone make an argument that it was wrongly decided. They simply explain it away on two grounds. First, they assert that the petitioner in PPF - that is, PPF itself - failed to present the Court with the so-called "lost" docket for the Age 60 Rule that "evidenc[ed] agency misrepresentation and fraud." Br. 16. But, as the petitioners admit, that "lost" docket has been available since 1985, when it was obtained in FOIA litigation. Br. 12. PPF's failure to cite evidence in PPF that it now believes is important does not justify ignoring the Court's decision in PPF. Second, the petitioners contend that PPF "relied on the FAA safety representations, which, as this record proves, fabricated material facts." Br. 17. As the FAA's decision pointed out, however, the FAA's alleged fraud and misrepresentation was before the courts as early as 1990, seven years before PPF was decided. J.A. 193-94 (Order at 11-12); see Yetman, 261 F.3d at 677 ("Petitioners have failed to explain how the FAA's awareness of the deficiencies in the Flight Time Study - incidentally, a fact that we were aware of in Baker [decided in 1990] - impacts our substantial evidence inquiry.").

The petitioners have no new evidence to offer, either. They do not deny that their evidence here "is no less than a decade old," J. A. 194 (Order at 12), arguing instead that they

have presented the "most up-to-date evidence" available. Br. 15.[16]

In short, nothing has changed since this Court decided PPF in 1997. The Court's "disposition of this case should [begin] with a citation to F.3d and there it should [end]." Cyprus Emerald Resources Corp. v. Federal Mine Safety & Health Review Comm'n, 195 F.3d 42, 46 (D.C. Cir. 1999) (Randolph, J., concurring).

III. THE FAA REASONABLY REFUSED TO REPEAL THE RULE BASED ON ARGUMENTS THAT HAD BEEN REPEATEDLY RAISED IN THE PAST.

Even if res judicata and stare decisis do not apply here, the FAA's decision refusing to repeal the Age-60 Rule based on arguments that have been repeatedly raised and litigated in earlier proceedings was neither arbitrary nor capricious.

A. When an agency receives a petition for rulemaking - or, in this case, an argument for repeal of a regulation that should have been made by way of petition for rulemaking - it may simply "deny the petition without having rethought the subject policy." National Mining Ass'n v. Department of the Interior, 70 F.3d 1345, 1351 (D.C. Cir. 1995). That is often the appropriate course for an agency when the petition for rulemaking proposes a "repeal [that] 'had already been considered in previous rulemakings.'" National Ass'n of Reversionary Property Owners v. Surface

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[16] Their citation to a January 2004 "position paper" of the Aerospace Medical Association, Br. 18, is so up-to-date that it was even not part of the administrative record before the FAA, which issued its decision in October 2003. Relying on it here violates the rules governing the record in federal appellate proceedings. 28 U.S.C. 2112(b); Fed. R. App. P. 16(a)(3).

Transp. Bd., 158 F.3d 135, 142 (D.C. Cir. 1998) (quoting National Mining Ass'n, 70 F.3d at 1348).

In this case, the FAA refused to repeal the Age 60 Rule, in large part because the petitioners raised arguments that had been raised, considered, and rejected before. The argument of economic favoritism was rejected in Aman, 856 F.2d at 954 n.7, and presented to the FAA again in the PPF and Yetman proceedings. J.A. 192-93 (Order at 10-11). The argument that the FAA had refused to collect data on the rule was presented and rejected in Yetman. Id. The claim that the FAA misrepresented accident studies was presented and rejected in Yetman. J.A. 193-94 (Order at 11-12). The contention that pilot incapacitation does not pose a risk in light of safety measures, including multiple-pilot crews, was presented to the FAA and rejected in the PPF and Yetman proceedings and addressed by the court in Yetman. J.A. 194 (Order at 12). In the Aman, Baker, and Yetman proceedings, the FAA had found that a variety of medical tests and protocols submitted did not provide the same level of safety as the Age 60 Rule, and the courts upheld the FAA's findings. J.A. 194-95 (Order at 12-13). The petitioners' claim that simulators could adequately screen at-risk pilots was previously made and rejected in the PPF and Yetman proceedings, and was considered by this Court in PPF. J.A. 195-96 (Order at 13-14). Finally, the ADEA argument was made and rejected in both PPF and Yetman. J.A. 196-97 (Order at 14-15).

Because the petitioners relied on decade-old evidence, no new medical protocols or studies, and recycled arguments, the FAA's refusal to reconsider the Age 60 Rule was neither arbitrary nor capricious.

B. The petitioners nevertheless argue that the FAA's decision is arbitrary and capricious, because the FAA knowingly relied on falsified data, misrepresented the

record, and engaged in delaying tactics in responding to the petition for exemption. Br. 18-19. The fraud and misrepresentation claims are a rehash of arguments made in previous proceedings, largely rejected in Aman, 856 F.2d at 954 n.7, and the delay argument, even if it were valid, offers the petitioners no remedy. The only remedy for delay is an order compelling agency action "unlawfully withheld or unreasonably delayed," 5 U.S.C. 706(1). See Gottlieb v. Peña, 41 F.3d 730, 734 (D.C. Cir. 1994) ("the proper recourse for a party aggrieved by delay that violates a statutory deadline is to apply for a court order compelling agency action") (citations omitted). Since the FAA has long since acted on the petition, a claim for an order compelling action would be moot.

The petitioners also argue that the decision was not based on substantial evidence, Br. 10-13, but that argument turns, again, largely on the charge of agency misrepresentation, based on the idea presented in several previous proceedings that the Smith-Quesada letters demonstrate that the Age 60 Rule was based on economic favoritism and not on safety. This adds nothing to the arguments in previous proceedings. The petitioners go on to argue that the FAA ignored the evidence they introduced, Br. 14-15, by which they apparently mean evidence about pilot incapacitation.[17] The FAA reasonably responded to this

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[17] They do not actually specify which evidence they mean but simply incorporate by reference large segments of their petition for exemption. For example, they claim that the FAA's decision "ignored [the fact that] the petitioners introduced this necessary evidence. (Petition at 41-50, 52-54)." Br. 12. Also, "[p]etitioners included the 'lost' docket and its documents as exhibits to the petition. (Exhibits C, D, E, F-1, G, H, I, J, K, M, N, O, Q). The decision below, however denied these records' existence, as the agency did for all these years." Br. 12. And, "[t]he FAA, however, did not apply its analytical method to the petitioners' evidence establishing that the likelihood of an accident resulting from the exemptions requested here was essentially zero. (Petition at 41-54)." Br. 12-13.

evidence by pointing out that the evidence cited by the petitioners was at least a decade old, that the argument about pilot incapacitation had been repeatedly made and examined in the past, and that Yetman had backed the FAA's approach. J.A. 194 (Order at 12). The FAA was not required to reconsider the rule based on such evidence.

The petitioners insist that the FAA's findings have no "credibility," Br. 13-17, but all the cases they cite, Br. 13, concern the credibility of witnesses at adjudicative hearings, not the credibility of the agency itself. The petitioners seem most interested in the claim that the agency knew of deficiencies in the Flight Time study, Br. 13, but, as the FAA explained, the court in Yetman, 261 F.3d at 677, held that this fact, known to the court in 1990, had no impact on the substantial evidence inquiry.[18]

After all this, the petitioners contend that review is de novo when agency action "is adjudicatory in nature and the agency fact finding process is inadequate." Br. 17. But this is a misreading of 5 U.S.C. 706(2)(F), which provides that a court may set aside agency action that is "unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court." (emphasis added) That is, if another statute expressly subjects agency decisions to de novo review, see, e.g., 7 U.S.C. 2023(a)(15), the court may set aside agency action based on mistaken fact determinations. There is no such other statute in this case; to the contrary, 49 U.S.C. 46110(c) provides that "[f]indings of

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[18] The petitioners also complain that the FAA mistakenly stated that they claimed there is currently a pilot shortage. They concede that there is not. Br. 15. But in arguing that the Age 60 Rule will cause future pilot shortages, they give no reason why the same rule that does not result in a pilot shortage today will result in a pilot shortage at some unspecified future date.

fact by the Secretary, Under Secretary, or Administrator, if supported by substantial evidence, are conclusive."[19]

IV. THE PETITIONERS' REMAINING ARGUMENTS ARE WITHOUT MERIT.

A. There Is No Violation Of Equal Protection.

The petitioners contend that the Age 60 Rule violates equal protection. Br. 19-20. But the Supreme Court, applying rational-basis review, has repeatedly rejected equal-protection challenges to mandatory retirement schemes. Gregory v. Ashcroft, 501 U.S. 452 (1991) (state judges required to retire at age 70); Vance v. Bradley, 440 U.S. 93 (1979) (foreign service officers had to retire at age 60); Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307 (1976) (state police had to retire at age 50). The Age 60 Rule does not even impose mandatory retirement; it merely prevents 60-year-old pilots from flying commercial aircraft. See Aman, 856 F.2d at 948. Because it is rational to conclude that there are safety risks involved in allowing pilots to fly commercial aircraft after they turn 60, the equal protection challenge must fail. See Massachusetts Bd. of Retirement v. Murgia, 427 U.S. at 315 ("Since physical ability generally declines with age,

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[19] For reasons that are unclear, the petitioners use the section of their brief discussing de novo review to raise two unrelated arguments. First, they urge the Court to follow some unspecified decisions of foreign courts, Br. 17-18, allegedly rejecting the rule. Yet, the brief cites a footnote in the petition that refers only to a decision of the Australian Human Rights and Equal Opportunity Commission, which appears to be not a court but an agency comparable to our own EEOC. Second, they claim there is an "incongruity" in the fact that the rule does not apply to federal agency pilots, military pilots, or test pilots, Br. 18, but they did not raise this argument in the petition and they do not explain what is incongruous about treating different kinds of pilots differently. See Air Line Pilots Ass'n, 276 F.2d at 898 (Age 60 Rule does not unreasonably impose greater restrictions on "pilots flying planes carrying large numbers of passengers who have no opportunity to select a pilot of their own choice" than on other pilots).

mandatory retirement at 50 serves to remove from police service those whose fitness for uniformed work presumptively has diminished with age.").

B. There Is No Violation Of Due Process.

The petitioners contend, Br. 20-22, that the FAA's decision violated due process, because it was based not on fact but on "bias and falsehood," as well as on "fiction" and "stereotype." Br. 21. This argument is duplicative of the petitioners' APA arguments. If the agency's refusal to grant exemptions to the petitioners survives APA review, as we have shown, the premise of the due process argument is falsified.[20]

C. The Information Quality Act Argument May Not Be Raised In This Proceeding.

Last (actually first in the brief), the petitioners argue that the FAA failed to consider whether the Age 60 Rule violates the "Information Quality Act"[21] and Office of Management and Budget Guidelines. Br. 6-9. This argument may not be raised here, because the petitioners did not raise it before the agency. 49 U.S.C. 46110(d). The only time the Information Quality Act and OMB guidelines were mentioned was in the second amendment to the petition. J.A. 180 (Second Amdt.). The reference there was not to the FAA's decision on the exemptions but only to a separate proceeding brought under the Department of Transportation's information-quality guidelines, in which the FAA allegedly was "violating the Data Quality Act and

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[20] Conversely, if the agency decision fails APA scrutiny, it is unnecessary to reach the due process argument.

[21] The Consolidated Appropriations Act, 2001, Pub. L. No. 106-554, § 1(a)(3), 114 Stat. 2763 (2000), enacted as law H.R. 5658, as introduced on December 14, 2000. Section 515 of that bill is what is informally referred to as the Information Quality Act, 114 Stat. 2763A-153 (44 U.S.C. 3516 note).

[OMB] guidelines," by "fail[ing] to act on a complaint." Id.; see id. n.3 (referring to complaint filed by Samuel D. Woolsey, Docket No. FAA-2003-14951-1). The FAA was not required to address the Information Quality Act, because "[a]n objection must be made with sufficient specificity reasonably to alert the agency." Tex Tin Corp. v. EPA, 935 F.2d 1321, 1323 (D.C. Cir. 1991).

Although one commenter did address the Information Quality Act argument - Samuel Woolsey himself, J.A. 230-31 (Comments of Age60Rule.com, at 1-2) - the FAA was not required to respond to that comment, because an argument about the Information Quality Act has no place in support of a petition for exemption. Both the statute and the OMB Guidelines require the establishment of "administrative mechanisms" to "obtain correction" of challenged information. The only means by which the adequacy of information may be challenged is through those administrative mechanisms; it may not be challenged in a petition for review of agency action in an independent matter like this attack on the Age 60 Rule.[22]

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[22] The Woolsey proceeding now before the FAA invokes these administrative mechanisms to dispute the information on which the Age 60 Rule is based. Although the Court obviously need not address the issue here, there is nothing in the statute or OMB guidelines that supports judicial review of the agency's action under these administrative mechanisms. Indeed, most agency guidelines issued pursuant to the statute and OMB guidelines - such as the Department of Transportation guidelines applicable to the FAA - expressly state that they represent the agency's policy views and do not create judicially enforceable rights. See, e.g., The Department of Transportation's Information Dissemination Quality Guidelines, ¶ III.b., http://dms.dot.gov/ombfinal092502.pdf (last visited on April 21, 2004) ("Nature and Legal Effect: These guidelines are policy views of DOT. They are not intended to be, and should not be construed as, legally binding regulations or mandates. These guidelines are intended only to improve the internal management of DOT and do not create any right or benefit, substantive or procedural, enforceable at law or equity, by any party against the United States, its agencies (including the Department of Transportation or any DOT organization), officers, or employees, or any person.").

The FAA was simply not required to consider this statute and the guidelines when it issued its denial of exemptions for the petitioners.

CONCLUSION

For the foregoing reasons, the petition for review should be denied.

Respectfully submitted,

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APRIL 2004

CERTIFICATE OF COMPLIANCE

I certify that this brief is proportionately spaced, using Times New Roman font, 13 point type. Based on a word count under Corel Word Perfect 9, this brief contains 12,521 words, excluding the Certificate as to Parties, Rulings, and Related Cases, the glossary, table of contents, table of authorities, addenda, and certificates of counsel.

/s/
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CERTIFICATE OF SERVICE

I hereby certify that on June 8, 2004, I served the foregoing Final Brief for the Respondent on the following by causing two copies to be hand-delivered to:

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I also certify that I filed the brief by causing an original and fourteen copies to be hand-delivered to the Clerk, U.S. Court of Appeals for the District of Columbia Circuit.

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STATUTORY AND REGULATORY ADDENDUM

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49 U.S.C. 40101(d)

* * * * *

(d) Safety considerations in public interest.--In carrying out subpart III of this part and those provisions of subpart IV applicable in carrying out subpart III, the Administrator shall consider the following matters, among others, as being in the public interest:

(1) assigning, maintaining, and enhancing safety and security as the highest priorities in air commerce.

(2) regulating air commerce in a way that best promotes safety and fulfills national defense requirements.

(3) encouraging and developing civil aeronautics.

(4) controlling the use of the navigable airspace and regulating civil and military operations in that airspace in the interest of the safety and efficiency of both of those operations.

(5) consolidating research and development for air navigation facilities and the installation and operation of those facilities.

(6) developing and operating a common system of air traffic control and navigation for military and civil aircraft.

(7) providing assistance to law enforcement agencies in the enforcement of laws related to regulation of controlled substances, to the extent consistent with aviation safety.

49 U.S.C. 44701

(a) Promoting safety. - The Administrator of the Federal Aviation Administration shall promote safe flight of civil aircraft in air commerce by prescribing -

(1) minimum standards required in the interest of safety for appliances and for the design, material, construction, quality of work, and performance of aircraft, aircraft engines, and propellers;

(2) regulations and minimum standards in the interest of safety for -

(A) inspecting, servicing, and overhauling aircraft, aircraft engines, propellers, and appliances;

(B) equipment and facilities for, and the timing and manner of, the inspecting, servicing, and overhauling; and

(C) a qualified private person, instead of an officer or employee of the Administration, to examine and report on the inspecting, servicing, and overhauling;

(3) regulations required in the interest of safety for the reserve supply of aircraft, aircraft engines, propellers, appliances, and aircraft fuel and oil, including the reserve supply of fuel and oil carried in flight;

(4) regulations in the interest of safety for the maximum hours or periods of service of airmen and other employees of air carriers; and

(5) regulations and minimum standards for other practices, methods, and procedure the Administrator

finds necessary for safety in air commerce and national security.

(b) Prescribing minimum safety standards. – The Administrator may prescribe minimum safety standards for-

(1) an air carrier to whom a certificate is issued under section 44705 of this title; and

(2) operating an airport serving any passenger operation of air carrier aircraft designed for at least 31 passenger seats.

(c) Reducing and eliminating accidents. – The Administrator shall carry out this chapter in a way that best tends to reduce or eliminate the possibility or recurrence of accidents in air transportation. However, the Administrator is not required to give preference either to air transportation or to other air commerce in carrying out this chapter.

(d) Considerations and classification of regulations and standards. - When prescribing a regulation or standard under subsection (a) or (b) of this section or any of sections 44702-44716 of this title, the Administrator shall -

(1) consider -

(A) the duty of an air carrier to provide service with the highest possible degree of safety in the public interest; and

(B) differences between air transportation and other air commerce; and

(2) classify a regulation or standard appropriate to the differences between air transportation and other air commerce.

(e) Bilateral exchanges of safety oversight responsibilities. -

(1) In general. - Notwithstanding the provisions of this chapter, the Administrator, pursuant to Article 83 bis of the Convention on International Civil Aviation and by a bilateral agreement with the aeronautical authorities of another country, may exchange with that country all or part of their respective functions and duties with respect to registered aircraft under the following articles of the Convention: Article 12 (Rules of the Air); Article 31 (Certificates of Airworthiness); or Article 32a (Licenses of Personnel).

(2) Relinquishment and acceptance of responsibility. - The Administrator relinquishes responsibility with respect to the functions and duties transferred by the Administrator as specified in the bilateral agreement, under the Articles listed in paragraph (1) for United States-registered aircraft described in paragraph (4)(A) transferred abroad and accepts responsibility with respect to the functions and duties under those Articles for aircraft registered abroad and described in paragraph (4)(B) that are transferred to the United States.

(3) Conditions. - The Administrator may predicate, in the agreement, the transfer of functions and duties under this subsection on any conditions the Administrator deems necessary and prudent, except that the Administrator may not transfer responsibilities for United States registered aircraft described in paragraph (4)(A) to a country that the Administrator determines is not in

compliance with its obligations under international law for the safety oversight of civil aviation.

(4) Registered aircraft defined. - In this subsection, the term "registered aircraft" means -

(A) aircraft registered in the United States and operated pursuant to an agreement for the lease, charter, or interchange of the aircraft or any similar arrangement by an operator that has its principal place of business or, if it has no such place of business, its permanent residence in another country; and

(B) aircraft registered in a foreign country and operated under an agreement for the lease, charter, or interchange of the aircraft or any similar arrangement by an operator that has its principal place of business or, if it has no such place of business, its permanent residence in the United States.

(f) Exemptions. - The Administrator may grant an exemption from a requirement of a regulation prescribed under subsection (a) or (b) of this section or any of sections 44702-44716 of this title if the Administrator finds the exemption is in the public interest.

49 U.S.C. 46110

(a) Filing and venue. - Except for an order related to a foreign air carrier subject to disapproval by the President under section 41307 or 41509(f) of this title, a person disclosing a substantial interest in an order issued by the Secretary of Transportation (or the Under Secretary of Transportation for Security with respect to security duties and powers designated to be carried out by the Under

Secretary or the Administrator of the Federal Aviation Administration with respect to aviation duties and powers designated to be carried out by the Administrator) in whole or in part under this part, part B, or subsection (l) or (s) of section 114 may apply for review of the order by filing a petition for review in the United States Court of Appeals for the District of Columbia Circuit or in the court of appeals of the United States for the circuit in which the person resides or has its principal place of business. The petition must be filed not later than 60 days after the order is issued. The court may allow the petition to be filed after the 60th day only if there are reasonable grounds for not filing by the 60th day.

(b) Judicial procedures. - When a petition is filed under subsection (a) of this section, the clerk of the court immediately shall send a copy of the petition to the Secretary, Under Secretary, or Administrator, as appropriate. The Secretary, Under Secretary, or Administrator shall file with the court a record of any proceeding in which the order was issued, as provided in section 2112 of title 28.

(c) Authority of court. - When the petition is sent to the Secretary, Under Secretary, or Administrator, the court has exclusive jurisdiction to affirm, amend, modify, or set aside any part of the order and may order the Secretary, Under Secretary, or Administrator to conduct further proceedings. After reasonable notice to the Secretary, Under Secretary, or Administrator, the court may grant interim relief by staying the order or taking other appropriate action when good cause for its action exists. Findings of fact by the Secretary, Under Secretary, or Administrator, if supported by substantial evidence, are conclusive.

(d) Requirement for prior objection. - In reviewing an order under this section, the court may

consider an objection to an order of the Secretary, Under Secretary, or Administrator only if the objection was made in the proceeding conducted by the Secretary, Under Secretary, or Administrator or if there was a reasonable ground for not making the objection in the proceeding.

(e) Supreme Court review. - A decision by a court under this section may be reviewed only by the Supreme Court under section 1254 of title 28.

Information Quality Act
(44 U.S.C 3516 note)

(a) In general. - The Director of the Office of Management and Budget shall, by not later than September 30, 2001, and with public and Federal agency involvement, issue guidelines under sections 3504(d)(1) and 3516 [this section] of title 44, United States Code, that provide policy and procedural guidance to Federal agencies for ensuring and maximizing the quality, objectivity, utility, and integrity of information (including statistical information) disseminated by Federal agencies in fulfillment of the purposes and provisions of chapter 35 of title 44, United States Code [this chapter], commonly referred to as the Paperwork Reduction Act.

(b) Content of guidelines. - The guidelines under subsection (a) shall -

(1) apply to the sharing by Federal agencies of, and access to, information disseminated by Federal agencies; and

(2) Require that each Federal agency to which the guidelines apply -

(A) issue guidelines ensuring and maximizing the quality, objectivity, utility, and integrity of information (including statistical information) disseminated by the agency, by not later than 1 year after the date of issuance of the guidelines under subsection (a);

(B) establish administrative mechanisms allowing affected persons to seek and obtain correction of information maintained and disseminated by the agency that does not comply with the guidelines issued under subsection (a); and

(C) Report periodically to the director -

(i) the number and nature of complaints received by the agency regarding the accuracy of information disseminated by the agency; and

(ii) how such complaints were handled by the agency.

14 C.F.R. 11.61

§ 11.61 May I ask FAA to adopt, amend, or repeal a regulation, or grant relief from the requirements of a current regulation?

(a) Using a petition for rulemaking, you may ask FAA to add a new regulation to title 14 of the Code of Federal Regulations (14 CFR) or ask FAA to amend or repeal a current regulation in 14 CFR.

(b) Using a petition for exemption, you may ask FAA to grant you relief from current regulations in 14 CFR.

14 C.F.R. 11.81

§ 11.81 What information must I include in my petition for an exemption?

You must include the following information in your petition for an exemption and submit it to FAA as soon as you know you need an exemption.

(a) Your name and mailing address and, if you wish, other contact information such as a fax number, telephone number, or e-mail address;

(b) The specific section or sections of 14 CFR from which you seek an exemption;

(c) The extent of relief you seek, and the reason you seek the relief;

(d) The reasons why granting your request would be in the public interest; that is, how it would benefit the public as a whole;

(e) The reasons why granting the exemption would not adversely affect safety, or how the exemption would provide a level of safety at least equal to that provided by the rule from which you seek the exemption;

(f) A summary we can publish in the Federal Register, stating:

(1) The rule from which you seek the exemption; and

(2) A brief description of the nature of the exemption you seek;

(g) Any additional information, views or arguments available to support your request; and

(h) If you want to exercise the privileges of your exemption outside the United States, the reason why you need to do so.

14 C.F.R. 121.383(c)
(Age 60 Rule)

§ 121.383 Airman: Limitations on use of services.

* * * * *

(c) No certificate holder may use the services of any person as a pilot on an airplane engaged in operations under this part if that person has reached his 60th birthday. No person may serve as a pilot on an airplane engaged in operations under this part if that person has reached his 60th birthday.

Oral Argument
Not yet scheduled

No. 03-1386

In the
United States Court of Appeals
for the
District of Columbia Circuit

DALLAS E. BUTLER; TOM GAMBLE; JEANNIE C. De LAMOS; PAUL TURNER, III; ALAN J. De SA; ARTHUR B. WARD; WOODROW M. HASSINGER; RUDY MACK, SR.; JOE R. McCABE; PHILIP B. NASH; MICHAEL L. OKSNER; and WILLIAM M. SIEGEL,

Petitioners-Appellants,

v.

MARION C. BLAKEY, Administrator, Federal Aviation Administration; and NORMAN Y. MINETA, Secretary, U.S. Department of Transportation,

Respondents-Appellees.

Petition for Review of an Order denying Relief by the Federal Aviation Administration, Department of Transportation, Docket No. FAA-2002-12501-6781, issued on October 9, 2003

***AMICUS CURIAE* BRIEF SUPPORTING PETITIONERS-APPELLANTS**

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March 29, 2004

CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

CERTIFICATE OF COUNSEL
REQUIRED BY D.C. CIR. RULE 28(a)(1)

(A) PARTIES AND *AMICI*

The 12 parties who petitioned the Federal Aviation Administration, and who appeal the Agency's decision, are:

Dallas E. Butler
Tom Gamble
Jeannie C. de Lamos
Paul Turner III
Alan J. De Sa
Arthur B. Ward
Woodrow M. Hassinger
Rudy Mack, Sr.
Joe R. McCabe
Philip N. Nash
Michael L. Oksner
William M. Siegel

No intervenors or *Amici* other than the Southwest Airline Pilots' Association ("SWAPA"), which is filing this

Brief have been identified in this matter. In accordance with D.C. Cir. Rules 28 (a) (1) (A) and 26.1 (a), SWAPA discloses that it has no parent corporation nor does it issue any stock.

(B) RULINGS UNDER REVIEW

The ruling at issue in this Court is an Order by John M. Allen, Acting Director, Flight Standards Service, Federal Aviation Administration, United States Department of Transportation, Docket No. FAA-2002-12501-6781, issued on October 9, 2003.

A copy of that Order is attached to the Petition for Review of Agency Order that the petitioners here filed October 30, 2003.

The Order was announced in Summary Notice No. PE-2003-74, at 68 Fed. Reg. 69761, 69764 (Dec. 15, 2003).

(C) RELATED CASES

The case under review was not previously before this Court or any other court. No other related cases are currently pending in this Court or any other court of which counsel is aware.

(D) ADOPTION OF PETITIONERS/APPELLANTS' STATEMENTS

SWAPA adopts Petitioners/Appellants' Statements of: Jurisdiction; Issues; the Case; and the Facts made in Petitioners/Appellants' Brief.

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STATEMENT OF *AMICUS CURIAE* IDENTITY

Amicus Curiae, Southwest Airlines Pilots' Association ("SWAPA") is an unincorporated association of Southwest Airlines, Inc. ("SWA") pilots that has no parent or subsidiaries and that issues no stock. Its membership includes one of the petitioners in this case, Michael L. Oksner and numerous members approaching the age of 60 years. The direction and authority to evaluate this case for purposes of filing an *Amicus Curiae* brief and to file this brief came from the President of SWAPA pursuant to a 2003 referendum to promote, withdraw, modify, and/or obtain exemptions to the Age 60 rule.

SUMMARY OF *AMICUS'* ARGUMENT

SWAPA urges this Court to grant the exceptions requested by the Petitioners-Appellants in their June 10, 2002 Petition for Exception (the "Petition") and reverse the Federal Aviation Administration's (the "Agency") October 6, 2003 blanket Denial of Exemption denying the Petition (the "decision") as it applies to each of the Petitioners-Appellants'. Alternatively, SWAPA respectfully requests that this Court remand the case to the Agency for further administrative proceedings as may be required based on the arguments presented in Petitioners-Appellants' Brief filed on March 10, 2004 and SWAPA's *amicus* brief.

SWAPA also requests that this Court consider SWAPA's elaboration herein on two points of fact and law relevant to the issues before the Court that have not been thoroughly and/or specifically addressed in Petitioners-Appellants' Brief.

In addition to Petitioners-Appellants' Argument that the Agency' decision failed to meet congressionally mandated standards and was not based on substantial

evidence, SWAPA's first point demonstrates that the Agency's "evidence," namely the Agency's Civil Aeromedical Institute's *Pilot Age and Accident Rates Report 4: An Analysis of Professional ATP and Commercial Pilot Accident Rates by Age* ("*CAMI 4*" or the "study") not only does not support the Agency's assertion in its decision that the study "...showed an increasing risk [of accidents] for pilots over the age of 60, but proves that there is no such risk increase.

SWAPA's second point in its *amicus* brief concern's the Agency's assertion in its decision that "[w]ithout further medical information regarding these petitioners...the petitioners have failed to present any evidence upon which an exemption might legitimately be based" as such applies to Petitioner Oksner and any other Petitioner similarly situated. Oksner has presented such evidence to the Agency, albeit it has not been replicated in the record of this case. This medical testing and the physician evaluations of Petitioner Oksner, now 59 years old, show him to be intellectually, cognitively, aerobically, and neuropsychologically very superior and significantly above average when compared to his age peers.

AMICUS' ARGUMENT

I. THE AGENCY IMPROPERLY BASED ITS DECISION ON AN ERRONEOUS CONSTRUCTION OF THE DATA CONTAINED IN THE AGENCY'S CIVIL AEROMEDICAL INSTITUTE'S PILOT AGE AND ACCIDENT RATE REPORT 4.

SWAPA agrees with Petitioners-Appellants that the Age 60 Rule[1] was not a regulation promulgated by the Agency pursuant to its authority to regulate "...in the

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[1] 14 C.F.R. 121.383 (c).

interest of safety for the maximum hours or period of service of airmen." 49 U.S.C. § 44701(a)(4); *see also*, id. at § 44702[2]; (Petitioners-Appellants Brief at 6-13). Further, the unequivocal Agency admission in *CAMI 4* that:

> [P]revious research [to *CAMI 4*] on aviation safety outcomes in relation to age has produced mixed results, with some studies indicating a trend across age and others failing to detect any relationship of age to safety outcomes such as accidents. As Li and Baker (1994) noted, "...no consensus has emerged in the literature" on the effect of pilot age on aviation safety.

CAMI 4 (at 11) therefore mandates a proper analysis of the accident/incident history data[3] collected in *CAMI 4* in order to come to a conclusion about whether the data's predictive value, if any, can be ascertained. However, the Agency's analysis of the data was not proper and, therefore the Agency's conclusion is erroneous. The Agency alleges that it was directed to obtain data pertaining to the accident/incident history of rates "...for professional pilots

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[2] In *Professional Pilots Federation, et al. v. Federal Aviation Administration*, 118 F.3d 758 (D.C. Cir. 1997) the Court based its opinion that the Age Discrimination in Employment Act, 29 U.S.C. § 621 et seq. (1967) ("ADEA") does not apply to Part 121 air carrier pilots on the narrow ground that "[n]othing in the Act [ADEA] can plausibly be read to restrict the FAA from making age a criterion for employment when it acts in its capacity as the guarantor of public safety in the air." A finding by this Court, as the Petitioners-Appellants and SWAPA urge, that the Age 60 rule was and is based on economics, not safety, renders this opinion baseless.

[3] The Agency has taken the position that accident/incident history is only a partial indicator of sudden and insidious pilot incapacitation when the data reveals no age relation to increasing risk of accidents/incidents, *see, Yetman v. Garvey*, 261 F.3d 664, 677-8 (7th Cir. 2001), and then takes a contrary position in *CAMI 4* when increasing risk is purportedly indicated. *See CAMI 4* at 43.

holding ATP or commercial and first- or second-class medical certificates. Specifically, the ratio of the number of accidents occurring for flights operating under 14 CFR § 121 and § 135 to annual hours flown by professional pilots holding an ATP or commercial and first- or second-class medical certificates was analyzed by age group for the period 1988 through 1997." (*CAMI* 4 at 12). This study thus includes and lumps together (i) data from Part 121 operations which does not include any data for pilots older than 59 years; (ii) data from Part 135 operations which does include data for pilots beyond age 59; and (iii) all other professional pilots holding an ATP or commercial and first- or second-class medical certificates which also includes data for pilots beyond age 59.[4] (*CAMI* 4 at 12). Lumped together this data purports to find the "expected" increase in accident/incident rate for pilots over age 59. (*CAMI* 4 at 13). However, SWAPA would point out that data, if analyzed separately for each of the three categories, reveals no statistically significant increase in accidents/incidents for either grouping of pilots for which data is available beyond age 59.[5] In fact, the data for Part 121 pilots, which results in an accident/incident rate barely one-third of the rate for the two other categories, decreases, albeit minimally, over the fifty-year-old increments analyzed. Of course, data to calculate this Part 121 rate is not available during the sixties because of the Age 60 rule. Accordingly, the accident/incident rate of the other two categories analyzed is significantly reduced through the fifty year increments analyzed, but not after age 59. Consequently, the "risk increase" "expected" and hypothesized by the Agency

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[4] Interestingly, the study does <u>not</u> include data about foreign professional pilots in foreign air carrier operations that would include data for pilots beyond age 59 and which would be the most representative of those American pilots subject to the age 60 rule.

[5] SWAPA is also convinced that the Agency's "expected" increase in accidents/incidents for comparable foreign air carrier pilots over age 59 would also not exist if such data was collected and analyzed separately.

results only from the erroneous methodology of analysis used by the Agency. SWAPA therefore concludes that the data analyzed separately proves no increase in risk for any category demonstrating that there are no safety issues regarding allowing Part 121 pilots to continue to fly air carrier operations through age 63.[6] Wherefore, SWAPA iterates its comment referenced in the Agency's decision (Decision at 6) that the Age 60 rule is discriminatory and that there is no credible evidence to support the Age 60 rule.

II. PETITIONER/APPELLANT MICHAEL L. OKSNER, A SWAPA MEMBER, HAS PROVIDED THE AGENCY WITH THE RESULTS OF MEDICAL TESTING THAT PROVES HIS AGE DOES NOT JUSTIFY APPLICATION OF THE AGE 60 RULE TO HIM.

The Agency decision recites as a basis of its denial of the exceptions that the petitioners have not provided any "...medical evidence as to each airman, scientific studies, or new scientific protocols that would justify an exemption." (Decision at 9). However, not only does *CAMI 4*, properly analyzed, meet the Agency's allegation about scientific studies, but Petitioner Oksner has previously submitted[7] the medical tests and the results he has previously undergone that recite that he is: aerobically exceptional and the equivalent of a 22-year-old;[8] in the very superior range of performance intelligence, the superior range of verbal intelligence and the range of his subtest scaled scores

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[6] SWAPA expects that the data for foreign air carrier pilots above the age of 59 would show no increase in risk beyond age 63 and through age 65, and iterates the point made in Petitioners-Appellants Brief that many of the world's aviation regulatory agencies allow air carrier pilots to fly air carrier operations until age 65 if such agencies proscribe an age rule at all.

[7] These medical and testing records were submitted to the Agency as part of the record in *Yetman v. Garvey*, 261 F3d 664, id. at 3, fn. 3.

[8] Petitioner Oksner turn 60 on April 5th, 2004.

compared with younger adults 20 through 34 years old; and his neuropsychological performance measures indicated above average for visuosequencing and information processing speed, auditory attention and concentration skills.

Wherefore, even if the Court somehow determines that the Age 60 rule was and remains a *bona fide* safety regulation, both of which SWAPA vigorously contests, the Agency's decision as it applies to Petitioner Oksner's exemption[9] should be reversed with instructions to grant the exception, or alternatively, remanded to the Agency for further administrative proceedings that are necessary in Petitioner Oksner's case.

CONCLUSION

SWAPA's *Amicus Curiae* brief is presented to this court in support of Petitioners-Appellants arguments and to present this court with an elaboration regarding the lack of evidence of risk of increased accidents and incidents and new argument regarding its member's medical condition in conformance with SWAPA's official position on age 60 rule issues in order that this Court have further basis to reverse the Agency's October 6, 2003 Denial of Exemption or, alternatively, to remand the case to the Agency for further proceedings as set out in the alternative in Petitioners-Appellants' Brief and SWAPA's Brief.

RESPECTFULLY SUBMITTED this 29th day of March, 2004.

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[9] Along with others similarly situated.

LUBIN & ENOCH, P.C.

/s/
Nicholas J. Enoch[10]
David Grant McCracken
Attorneys for *Amicus Curiae* SWAPA

CERTIFICATE OF COMPLIANCE
LENGTH OF BRIEF

I am a member of the Bar of this Court and serve as Attorney for *Amici* in this case. I certify that foregoing Brief contains 1,707 words according to the Corel WordPerfect 11 program used to prepare and revise this Brief, in compliance with FRAP Rule 32(a)(7)(C) and Circuit Rule 32(a)(3)(C).

DATED this 29th day of March, 2004.

LUBIN & ENOCH, P.C.

/s/
Nicholas J. Enoch
David Grant McCracken
Attorneys for *Amicus Curiae* SWAPA

CERTIFICATE OF SERVICE

I certify that 2 copies of the foregoing *Amicus Curiae* Brief has been served to the following counsel for Petitioners-Appellants and Respondents-Appellees by hand-delivery via FedEx on March 29, 2004:

---

[10] Nicholas J. Enoch was admitted to practice before the United States Court of Appeals for the District of Columbia Circuit on July 31, 2000. David Grant McCracken has an application pending to allow him to practice before this Court.

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PETITION FOR EXEMPTION

(I) -- INTRODUCTION

(I) (A) -- PETITIONERS

This request for exemption is submitted on behalf of the following 10 petitioners.

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(I) (B) -- SECTION OF 14 CFR FROM WHICH RELIEF IS SOUGHT

The above-named petitioners request relief from irreparable harm caused by the age 60 rule[1] set forth in 14 CFR 121.383(c), their exemption from the said rule to take effect no later than 120 days from the date of filing of this petition.[2]

(I) (C) -- EXTENT OF RELIEF SOUGHT, AND REASONS FOR REQUEST.

The petitioners request that their right and privilege to pilot aircraft in commercial air transport operations not be subject to termination on the basis of age, but that they and their employers be exempted from the prohibitions of the rule on the same criteria (*i.e.*, regularly published medical and performance standards) that apply to pilots under age 60. The petitioners request this relief because they desire to continue to serve as commercial airline pilots, realizing that their service in such capacity will be in the public interest and compatible with aviation safety.

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[1] "No certificate holder may use the services of any person as a pilot on an airplane engaged in operations under this part if that person has reached his 60th birthday. No person may serve as a pilot on an airplane engaged in operations under this part if that person has reached his 60th birthday." 14 CFR 121.383(c).

[2] This petition is filed pursuant to 14 CFR 11.51(b).

(I) (D) - - THE ADMINISTRATOR HAS A STATUTORY DUTY TO CONSIDER SAFETY AND OTHER FACTORS AFFECTING THE PUBLIC INTEREST WHEN DECIDING WHETHER TO EXERCIZE AUTHORITY TO GRANT THE EXEMPTIONS REQUESTED HERE.

If, as the Federal Aviation Administration (the agency) asserts, the age 60 rule (14 CFR 121.383(c)) is a safety regulation deriving from authority residing in the Administrator under 49 USC 44701(a) or (b), 49 USC 44703, or 49 USC 44705(a), the Administrator has statutory authority to grant the exemptions requested here provided that the Administrator finds the exemptions to be in the public interest (49 USC 44701(f)).

In deciding whether to grant these exemptions, the Administrator has a statutory duty to consider the following matters identified in 49 USC 40101(c), (d), among others, as being in the public interest:

--The requirements of national defense and commercial aviation (49 USC 40101(c)(1));

--Regulating air commerce in a way that best promotes safety and fulfills national defense requirements (49 USC 40101(d)(1)); and

--Encouraging and developing civil aeronautics (49 USC 40101(d)(2)).

If, however, as demonstrated conclusively *infra*, the rule is not safety-related but rather economic and/or administrative in purpose and effect, the Administrator has a statutory duty to consider the following additional matters identified in 49 USC 40101(a), (b), among other factors, as being in the public interest:

--Assigning and maintaining safety and security as the highest priority in air commerce (49 USC 40101(a)(1));

--Preventing deterioration of established safety procedures (49 USC 40101(a)(3));

--Assuring the availability of adequate service without unreasonable discrimination or unfair or deceptive practices (49 USC 40101(a)(4), (b)(3));

--Coordinating transportation by, and improving relations among, air carriers, and encouraging fair wages and working conditions (49 USC 40101(a)(5));

--Strengthening the competitive position of air carriers to at least ensure equality with foreign air carriers, including the attainment of the opportunity for U.S. air carriers to maintain and increase their profitability in foreign air transportation (49 USC 40101(a)(6), (a)(15), (e)(1));

--Developing and maintaining a sound regulatory system as to the present and future needs of the commerce of the United States and the national defense (49 USC 40101(a)(7), (b)(1)(C));

--Preventing unfair, deceptive or predatory practices (49 USC 40101(a)(9));

--Ensuring that consumers in all regions of the United States, including those in small communities and rural and remote areas, have access to affordable, regularly scheduled air service (49 USC 40101(a)(11), (a)(13));

--Encouraging and developing practices to provide efficiency, innovation and low prices (49 USC 40101(a)(12)).

The Administrator's consideration of the public interest matters as prescribed in 49 USC 44701(f) is not discretionary; "the Secretary of Transportation *shall consider*" (49 USC 40101(a), (b), (c), (d)). Nor is the statutory list of factors exclusive; "the following matters, *among others*" (49 USC 40101(a), (d)) (emphasis added). Among these other factors that actually affect the public interest, and which the Administrator therefore has a nondiscretionary, statutory duty to consider, are:

--Obligation to deal honestly and fairly with pilots, the public, the United States Department of Justice, the United States Congress, the federal courts, and international organizations and treaty partners of the United States;

--Need to collect and honestly assess evidence on significant issues of relevance, especially with respect to matters of public safety and public interest;

--Requirement to consider all relevant evidence before making decisions on application of regulatory policy;

--Obligation to act in good faith on recommendations of sister agencies of the Executive Branch (such as the United States Equal Employment Opportunity Commission [EEOC] and the National Institutes of Health [NIH]) and presidential directives;

--Elimination of unjustified age discrimination in employment (see Age Discrimination in Employment Act, 29 USC 621, "Statement of Findings and Purpose").

The FAA has recognized the statutory authority under 49 USC 44701(f) and 49 USC 40101(a), (b), (c), (d), by effectuating regulations providing for exemptions such as

those requested here, and has spelled out the requirements for the granting of such exemptions (14 CFR 11.61(b)). These rules require, *inter alia*, that petitioners set forth:

--Reason why granting the exemption would be in the public interest, *i.e.*, how it would benefit the public as a whole (14 CFR 11.81(d)).

--Reason that the grant of exemption would not adversely affect safety, or that it would provide a level of safety at least equal to that provided by the rule from which exemption is sought (14 CFR 11.81(e)).

(II) - - THE REQUESTED EXEMPTIONS WILL NOT ADVERSELY AFFECT SAFETY BECAUSE THE AGE 60 RULE ITSELF IS NOT EVEN RELATED TO SAFETY.

In 14 CFR 11.81(e), the Administrator acknowledges the significance of safety in the public interest by requiring that petitioners show why a grant of exemption such as sought here "would not adversely affect safety," or how it would provide "a level of safety at least equal" to that provided by the age 60 rule.

The age 60 rule, however, does not now have, and it never has had, anything to do with safety. Indeed, the factual predicate of the rule now is exposed as false. This is not a safety rule and it never has been a safety rule. The sad truth is that the agency has misrepresented the factual basis, evidentiary support and true purpose of this age rule from the time it was proposed on February 5, 1959 to the time it was published ten months later, and even to the present time. The agency has concealed the fact that the original purpose of the rule was to serve as an act of pure favoritism, undoing the result of a labor-management controversy that was essentially economic in nature and that had been

resolved through normal labor-management dispute resolution processes. Furthermore, throughout the entire life of the rule to this day, the evidence shows that the FAA intentionally, continuously and purposefully has acted to preclude the production, collection and analysis of evidence that would tend to disprove the agency's claim that the rule was established for safety purposes.

Evidence long known to FAA, and now publicly exposed by petitioners herein, discloses that the rule was devised as an intentional act of economic favoritism by the new Administrator of the newly created FAA, motivated by a long-standing personal friendship for an airline company chairman who had lost both arbitration and a strike over a management-imposed discriminatory age 60 retirement policy.

As shown in this petition, the age 60 rule started as, and it continues to exist as, an intended favor to airline executives. It was started so management would not have to train older, senior pilots to fly the first jetliners but could instead recruit young aviators many of whom had military jet training. Furthermore, it has been kept in force so management can avoid the inconvenience and supposed expense of changing retirement and pension programs.

(II) (A) -- THE FAA HAS, FOR THE ENTIRE LIFE OF THE RULE -- FROM ITS FIRST GERM OF AN IDEA, TO ENACTMENT TEN MONTHS LATER, TO THE PRESENT DAY -- MISREPRESENTED THE RULE'S FACTUAL BASIS, ITS EVIDENTIARY SUPPORT AND ITS TRUE PURPOSE: ECONOMIC FAVORITISM (TO REVERSE THE OUTCOME OF A LABOR-MANAGEMENT CONTROVERSY THAT WAS ESSENTIALLY ECONOMIC AND THAT HAD BEEN RESOLVED THROUGH NORMAL DISPUTE RESOLUTION MECHANISMS, AND LATER TO SAVE AIRLINES THE ADMINISTRATIVE COST AND INCONVENIENCE OF CHANGE).

The origin and purpose of the age 60 rule truly had nothing to do with safety. The asserted factual predicate for the rule was a fiction. The Administrator's actual purpose in creating the rule was not safety but, as is demonstrated below, unadulterated personal favoritism. At the time when the rule was established, and subsequently, there was no evidentiary support for it as a safety rule. Before the rule was put in place, there was no particular reason for concern about pilot age as a factor in air transport safety. [3] Air carrier flight hazards that existed in the 1950s resulted from a primitive system of airspace management and bureaucratic obstacles to the development of the technology to correct those deficiencies. The known hazards in the skies did not have anything to do with the age of the pilots,

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[3] FEDERAL AVIATION ACT OF 1958, H.R. No. 2360, 85th Cong., 2d Sess. (1958), reprinted in U.S. CODE & CONG. & ADMIN. NEWS 3741, 3742 (P.L. 85-726): "The magnitude and critical nature of the problem came first to general public notice, perhaps, as a result of the midair collision of two airliners over Grand Canyon on June 30, 1956, when 128 lives were lost. Following this disaster were fatal air crashes between civil and military aircraft operating under separate flight rules established in the Civil Air Regulations." The accidents had nothing to do with pilot age.

as an historical review (*infra*) clearly will establish.[4] Post-Second World War II growth of air commerce and an antiquated airspace management system, complicated by different and separate rules for military and civil aircraft, led to dramatic incidents and accidents. The introduction of jet transport aircraft (first the Boeing B-707), with high speeds, huge turning radii, different flight characteristics, and need for an enlarged airport footprint (longer runways, shallower climb-out angles and higher ground noise levels) further complicated the issue. Inasmuch as radar was not yet available outside the major metropolitan areas, air traffic controllers ascertained aircraft position (and distances separating airplanes in flight) by "dead reckoning," *i.e.*, calculating present position from pilot-reported speed and direction from last-known fix, with a guess factor thrown in for wind effect.

Among the many aviation studies ordered by the government during the period (studies identified in the legislative history of the 1958 Federal Aviation Act [FAAct]), three had relevance to the pilot retirement age issue: the 1952 Doolittle Report,[5] the 1955 Harding Commission

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[4] FEDERAL AVIATION ACT OF 1958, H.R. No. 2360, 85th Cong., 2d Sess. (1958), reprinted in U.S. CODE & CONG. & ADMIN. NEWS 3741 (P.L. 85-726): "The principal purpose of this legislation [the 1958 FAAct] is to establish a new Federal agency with power adequate to enable it to provide for the safe and efficient use of the navigable airspace by both civil and military operations.... The Administrator of the new Federal Aviation Agency (1) would be given full responsibility and authority for the advancement and promotion of civil aeronautics generally, including the promulgation and enforcement of safety regulations, and (2) would be charged with the management of the national airspace, including responsibility for establishing and enforcing air traffic rules and for the development and operation of air navigation facilities." The legislative history of the 1958 FAAct indicates no reason for concern about pilots of more mature years.

[5] President's Airport Commission (James Doolittle, Chairman), *The Airport and Its Neighbors: Report of the President's Airport Commission* (May 16, 1952).

Report,[6] and the Flight Safety Foundation reports of 1958.[7] The issue was additionally complicated by competing interests between older pilots and airline managements seeking to replace them with younger aviators at less cost (many if not most of whom were former military pilots already trained on jets).

The Doolittle Report, a study directed at identifying needed airport improvements to accommodate jets, offered more than a score of unrelated, unsolicited recommendations. Among these was a suggestion that a study of pilot aging be conducted and that it be assigned to the Aero Medical Association (now the Aerospace Medical Association).[8] The association, taking on the assignment, formed a committee which issued at least one report, which told how it had reviewed some basic research then under way on body organs (eyes, lungs, heart).[9] With respect to the problem of assessing older pilots' performance, the committee concluded that aircraft simulators held great promise to test overall performance of the individual pilot, for both effectiveness and safety reasons.[10] Furthermore, a review of

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[6] *Aviation Facilities: Report of the Aviation Facilities Study Group to the Director, Bureau of the Budget* (Dec. 31, 1955).

[7] Flight Safety Foundation, FSF/CAA Medical Study. Report 1, *Physical Qualifications of Air Traffic Control Personnel* (Feb. 21, 2958). Report 2, *Medical Aspects of Civil Aviation* (Mar. 31, 1958). Report 2 examined pilot qualifications.

[8] *The Airport and Its Neighbors, supra* note 5 at 59-60.

[9] This report survived as part of the Reighard files, obtained through Freedom of Information Act litigation. See note 22 and related text.

[10] Aero Medical Association, *Report of the Committee on Pilot Ageing and Allied Problems*, Presented at the 25th Annual meeting of the Aero Medical Association, Washington, D.C., 3. March 30, 1954 (see Exhibit A):

> The Committee has expressed great interest in the possibility of using the Dehmel Flight Simulator as a possible method of checking the abilities of pilots in the older age range. .... These electronic devices

the annual indexes (1952-1959) and relevant contents of *The Journal of Aviation Medicine*, the official publication of the Aero Medical Association, shows neither concern about nor particular interest in the aging air carrier pilot prior to promulgation of the age 60 rule in December 1959. Indeed, where discussed at all, the conclusions were that experience was an invaluable asset;[11] the airline pilot was superior in health and fitness to the general population;[12] and – clearly reflecting the conclusion of the Aero Medical Association's Ageing Pilot Committee – that the excellent safety record of the civil airline industry was attributable to the rigid flight tests continually required of pilots by the scheduled airline operators.[13]

The next year, the Harding Commission issued its report, focusing on inadequacies of airspace management and air traffic control, dramatizing the introduction of jet transport aircraft and the growing conflict between Cold War military

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> are designed so that any flight problem can be simulated under very realistic conditions. These trainers reproduce the exact cockpit instrumentation and include motion and sound effects. It is obvious that any procedures that can be developed to appraise pilot ability on a more objective basis...will contribute to flight safety and to a more precise appraisal of changes involved in the ageing [*sic*] process.

[11] K. Stratton, *Medical Care of Airline Pilot Personnel*, presented to the 25th annual meeting of the Aero Medical Association (Washington, Mar. 29-31, 1954), reprinted in AVIATION MEDICINE 330-336 (Dec. 1954).

[12] R. McFarland, *Psycho-Physiological Problems of Aging in Air Transport Pilots*, presented to the 24th annual meeting of the Aero Medical Association (Los Angeles, May 11-13, 1953), reprinted in AVIATION MEDICINE 210, 219 (June 1954). H. Edwards, *The Aged and Retiring Pilot*, presented to the 25th annual meeting of the Aero Medical Association (Washington, Mar. 29-31, 1954), reprinted in AVIATION MEDICINE 73-75 (Feb. 1955).

[13] R. McFarland, *supra* note 12 at 219. The committee adopted the odd spelling of *ageing*.

and civil aviation needs. Though this report was unrelated to, and made no mention of, the pilot aging issue, FAA took some of the report's more dramatic language (regarding higher altitudes and speeds, more lives at risk, greater turning radii, [14] and extreme closure rates between aircraft) out of context so as to prejudice the debate over the age 60 rule.

In 1956, the Civil Aeronautics Administration (CAA, the predecessor of the FAA) commissioned the Flight Safety Foundation (a nonprofit aviation research facility associated with the Guggenheim Foundation) to perform evaluations of aviation medical certification standards[15] -- with specific emphasis on air traffic controllers. The CAA ordered that the study be performed in two parts. The first part, which was ordered expedited, was about air traffic controllers, regarded as the hot topic having safety import. The second part, on the subject of pilots, was to be delivered later. Report 1 emphasized the stressful nature of the air traffic controllers' job and recommended revisions of their medical standards, including consideration of a maximum age limit.[16] But Report 2, discussing pilots only, made no

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[14] Indeed, it was the failure of the air traffic control system to recognize and accommodate the larger turning radii associated with the higher speeds of jet aircraft that was the proximate cause of the mid-air collision *less than 10 years later* between a United DC-8 (jet) and a propeller-driven TWA Constellation over Staten Island on Dec. 16, 1960.

[15] The requirement for medical certification is not restricted to pilots. Other occupations in the aviation field such as air traffic controllers and airport tower operators are required to obtain and maintain medical certifications.

[16] FSF/CAA Medical Study (1958) Report 1:

Conclusions [Air Traffic Controllers]:

1. Safety and efficiency in air traffic control are critically dependent upon the human factor....
2. The work of air traffic control places a heavy demand upon the physical, mental and emotional capabilities of the individual controller.

mention of an age limit issue; it found the then-established criteria for class I and II pilot medical certificates satisfactory, and explicitly stated that no changes were required in pilot medical qualifications on account of the introduction of jet aircraft.[17] The various changes recommended by these two reports got adopted in an FAA rulemaking that actually coincided, timewise, with the FAA rulemaking for the age 60 rule.[18] Strangely, even though medical issues, and only medical issues, were asserted as determinative in both, neither rulemaking made any mention of the other.

> 3. Present medical standards for applicants (Second Class Airman's Medical Certification) needs a revision.... In addition, further validation of psychological aptitude tests is needed to provide a more reliable measurement of special personal characteristics closely related to successful job performance.
>
> ....
>
> 7. Further study should be given, particularly to:
>
> ....
>
> e) Aging and its relation to job efficiency.

[17] FSF/CAA Medical Study (1958) Report 2:

> Recommendations for change [Pilots]:
>
> ....
>
> 3. No sound medical basis can be found at this time to justify any further change in medical qualifications applicable to airmen in jet or turbo-prop transport operations.
>
> ....
>
> 6. The...medical qualifications [for] the several categories of 'airmen' should remain unchanged except for air-traffic control-tower operators.... (See Report No. 1).

[18] NPRM, Physical Standards for Airmen, Medical Certificates, 24 Fed. Reg. 2257 (Mar. 21, 1959); NPRM, Maximum Age Limits for Pilots, 24 Fed. Reg. 5247 (Jun. 27, 1959); Final Rule, Physical Standards for Airmen; Medical Certificates, Amendment to Medical Standards, 24 Fed. Reg. 7309 (Sept. 11, 1959); Final Rule, Maximum Age Limitations for Pilots, 24 Fed. Reg. 9767 (Dec. 5, 1959).

The only medical rationale that really existed for the imposition of any mandatory age limit in civil aviation, in fact, pertained to air traffic controllers, not pilots. Hazards to air safety - associated with airspace congestion, antiquated equipment and procedures for airspace management, different and separate rules and regulations for civil and military flights, and the introduction of jet transport aircraft complicated the air traffic controller's job tremendously - but had nothing to do with age of pilots. In the U.S. air transport industry, only six pilots (ages 28, 36, 44, 47, 50 and 52) had fatal heart attacks in the eight-year period immediately preceding enactment of the Federal Aviation Act and imposition of the age 60 rule - and none resulted in aircraft accident or incident.[19] Three of these occurred after landing. Three occurred in flight; in each case the other pilot assumed command and landed safely. In none of these cases was the aircraft, or anyone in it other than the cardiac victim himself, in any harm or peril.[20]

The age 60 rule governing airline pilots was not put on the books because of air traffic congestion or safety considerations of any kind, however. As shown below, it really was because of labor strife, economics, and the circumstance of a powerful airline executive's connections with an autocratic new FAA Administrator.

What the FAA never has admitted publicly - and indeed has concealed from the courts, Congress and citizenry for more than four decades - is that the age 60 rule was not initiated as a safety measure. Nor was it crafted to avoid any medical risk. Rather it was a tool of false economy, an act of supposed economic favoritism to reverse what an airline

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[19] H. Orlady, *ALPA Views on Pilot Selection, Monitoring and the Criteria for Release from Duties Involving Flying*, presentation to Flight Safety Foundation International Seminar, Madrid (Nov. 17, 1966).

[20] See Orlady, *id.*

executive saw as the disappointing result of recent labor strife. It began as a personal favor by the FAA's new Administrator, Elwood Quesada, for his friend and former wartime associate C.R. Smith, chairman of American Airlines. The purpose was – by regulation – to force Smith's older pilots into early retirement, a goal that American Airlines and some of the other carriers unsuccessfully had sought through contract negotiations and grievance arbitrations.

The Administrator's Secret Purpose: Personal Favoritism, to Accomplish a Reversal of the Outcome of a Labor-Management Dispute.

The truth about the origins of the age 60 rule is disclosed by two contemporaneous sources of credible evidence: (1) a 1961 paper by a Stanford Business School professor, Karl Ruppenthal, recounting the open history of the origin and preparation of the rule,[21] and (2) an extensive and hitherto private collection of FAA documents amassed by Dr. Homer Reighard, who had been at the FAA during the rule's inception, and who retained the documents until his retirement as Federal Air Surgeon 1984. The Reighard files were obtained through litigation under the Freedom of Information Act.[22] Any doubt that the age 60 rule

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[21] Karl M. Ruppenthal, *Compulsory Retirement of Air Line Pilots*, 14 Indus. & Lab. Rel. Rev. 528 (1961). (See Exhibit B.) Ruppenthal, an attorney, professor of transportation studies at Stanford, and retired airline pilot, was well qualified to report on and interpret the events as they occurred. But he was not privy to the secret correspondence between General Quesada and the chairman of American Airlines, nor to other documents then still hidden in the Reighard files; hence, he was unaware of the blatant economic favoritism that specifically motivated the rule.

[22] *Haley, Bader & Potts v. FAA*, Civil No. 85-1943, Dist. Ct., D.C. Filed June 14, 1985. Final Order dated June 27, 1985. Documents garnered by Homer Reighard and later obtained through the *Haley* litigation are herein referred to as coming from the Reighard files.

originated in labor strife, or that its purpose was to resolve the labor dispute in management's favor, is dispelled by Reighard's trove and Ruppenthal's paper. The latter recounted that in the mid to late 1950s several airlines sought unilaterally to impose age-60 retirement policies. At three carriers (Western, TWA and American), however, the pilots resisted through their contract grievance machinery. All three of these grievances were decided in favor of the pilots' position through neutral arbitration. Western Airlines defended its position by arguing that the issue was not suitable for arbitration because it concerned the safety of the carrier's operations.[23] The arbitrator rejected each of Western's purported "safety" arguments, ruling:

> There is no testimonial basis and no 'fact of life' on which we could be expected to take a kind of 'judicial notice' that supports the view that it is unsafe to let a pilot perform after the age of 60. That is not to say that there is not some age - - say 90 - - when we would take judicial notice of physical impairment beyond all reason. It is enough to say that the evidence here does not support the theory that the attainment of age 60 is in itself enough to disqualify a pilot.[24]

American Airlines adamantly refused to comply with the binding arbitration. Management noncompliance with the arbitration order became an issue in a costly strike that lasted from December 20, 1958 to January 10, 1959. Smith agreed to reinstate the pilots as part of the settlement of the strike - but delayed doing so while conspiring with Quesada to engineer the imposition of the company's age 60 rule as a federal regulation. Administrator Quesada retired

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[23] *Id.*, at 533.

[24] *Id.*, at 535.

shortly thereafter and promptly was elected to a seat on the Board of Directors of American Airlines.[25]

The true origin of the age 60 rule is revealed in secret letters that Smith wrote to Quesada. In a February 5, 1959 letter on his personal stationery, Smith wrote to Quesada:

> Dear Pete:
>
> During the course of our recent negotiations with the pilot's [*sic*] association we found it unwilling to agree to the company's policy concerning retirement of air line pilots at age 60.
>
> I have no specific recommendation to make to you at this time. It appears obvious that there must be some suitable agre [*sic*] for retirement. It appears equally obvious that as men become older the result of the usual physical examination becomes less conclusive.
>
> It may be necessary for the regulatory agency to fix some suitable age for retirement.[26]

Ten months to the day from Smith's first private request, the age 60 rule became a federal regulation with full force of law

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[25] *Id.*

[26] C.R. Smith, letter to Gen. Elwood Quesada (Feb. 5, 1959). (See Exhibit C.) Note the personal nature of the letter. The typographical errors and hand correction indicate that Smith himself prepared it. Note also Smith's admission of his inability to impose his will on the pilots, his unsubtle suggestion that regulatory relief might "be necessary," and his pointed reference to medical uncertainties as a rationale. (From the Reighard files.)

- purportedly justified, as Smith had suggested, by conclusory assertions of medical uncertainties.

Within eleven days of Smith's plaintive plea of February 5, a four-page medical justification for the rule had been drafted.[27] Within about four months, the Notice of Proposed Rulemaking (NPRM) was published in the Federal Register - replete with purported medical justifications.[28]

On March 9th, just over one month from the date of Smith's letter, Reighard himself (apparently not yet fully "in the loop") prepared a memo to the Acting Chief Civil Air Surgeon, noting that airline captains were required to accomplish a proficiency check twice yearly, and suggesting that this proof of "ability to perform under realistic flight conditions" should be a reasonable test of airline pilots. Reighard further suggested that the FAA consider offering its services to the airline companies to "interpret existing medical knowledge" to ensure the adequacy of age considerations during the required periodic testing regimes.[29] The suggestions apparently fell on deaf ears, as there is no evidence that they were ever acted on.

A "Record of Visit" retained in the Reighard files dated February 8, 1960 recounts a visit in which a supporter of the recently adopted age 60 rule claimed that the older pilots passed their physicals by going to the same doctor who "does not give a very rigid physical." As an addendum, the writer stated that "Dr. Reighard checked a sample of ten of

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[27] J.H. Britton, M.D., Rough Draft, Feb. 16, 1959. (From the Reighard files.) (See Exhibit D.)

[28] NPRM, Maximum Age Limitations for Pilots, 24 Fed. Reg. 5247 (Jun. 27, 1959).

[29] Homer Reighard, Acting Chief, Medical Certification Branch, memorandum to Acting Civil Air Surgeon, March 9, 1969. (From the Reighard files.) (See Exhibit E.)

the *forty pilots known to be active airline pilots over 60* and found that no two of the ten went to the same examiner."[30] (There were not forty pilots known by the FAA at that time to be over 60 and active airline pilots. A little over two months earlier, the Air Surgeon, James Goddard, had explained that the number 40 was nothing more than an approximation based on the fact that there were seven pilots over 60 at Eastern Air Lines, and that Eastern Air Lines was thought to represent "a one-sixth sample of the total air carrier pilot population." [31])

Correspondence between Quesada and the Rev. Theodore Hesburg, president of Notre Dame University, indicates that the Administrator spared no effort in seeking endorsements for the proposed age rule. Father Hesburg admitted he had no relevant expertise, but gave his endorsement anyway.[32] Quesada, in turn, admitted that he also had no data on which to base the proposal, and was aware that he was on treacherous ground when he asked for confidentiality because "premature revelation might make [the regulations] much more difficult to achieve."[33]

Smith, of American Airlines, in a letter to Clarence Sayen, the president of the pilots' union, disingenuously sought agreement on the retirement issue or, alternatively, agreement to petition FAA for a regulation.[34] What Smith

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[30] A. Commander, FS-41 "Record of Visit" dated February 8, 1960. (From the Reighard files.) (Emphasis added.) (See Exhibit F.)

[31] James L. Goddard, AS-1 memorandum to Special Assistant to the Administrator, OA-3 Nov. 23, 1959. (From the Reighard files.)

[32] Rev. Theodore Hesburgh, letter to Gen. Elwood Quesada (Mar. 30, 1959). (From the Reighard files.) (See Exhibit G.)

[33] Gen. Elwood Quesada, letter to Rev. Theodore Hesburg (Apr. 17, 1959). (From the Reighard files.) (See Exhibit H.)

[34] C.R. Smith, letter to Clarence N. Sayen (Apr. 3, 1959), and transmittal of blind copy to Elwood Quesada. (From the Reighard files. (See Exhibit I.)

withheld from the union was the fact that he already had approached Quesada directly and received the Administrator's promise of support, and knew full well that the FAA rulemaking process was well under way.

Responding to a request by Quesada, Smith prepared a three-page memo to Quesada April 30, 1959, on plain paper, with the notation, "Mail to home address." In it, Smith provided results of American's 707 jet retraining program, numbers of pilots already retired, and age groups of pilots then employed by the airline.[35] The Administrator had charts prepared from Smith's transition training time data. These charts became Quesada's favorite presentation when arguing for the proposed rule. However, as documented herein, this argument was abandoned after it was reviewed by FAA attorneys, who recognized there was no objectively sound basis for the rule.

Primarily on the basis of a presentation of Smith's transition training time data at a June 3, 1959 meeting hosted by Quesada, an FAA Advisory Panel of eight hand-picked experts endorsed an age 55 limit for jet transition and, after some debate, an age 60 rule for retirement.[36] Dr. James Birren, one of the original panel participants has declared that the unwitting panelists, unaware of the labor controversy surrounding the issue, agreed in favor of only temporary adoption of an age 60 retirement rule.[37] The economic purpose of the age 60 rule was noted in a memo by B.W. Hogan, Rear Admiral, MC, USN, reporting on the panel's meeting. Hogan began his memo by repeating some

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[35] C.R. Smith, memo to Elwood Quesada (Apr. 30, 1959). (From the Reighard files.) (See Exhibit J.)

[36] Advisory Panel invitation, agenda and minutes (Jun. 3, 1959 meeting). (From the Reighard files.) (See Exhibit K.)

[37] Dr. James Birren, former Chief, Section on Aging, National Institute of Mental Health, letter to Samuel D. Woolsey, January 20, 1995. (See Exhibit L.)

of the data he obtained at the meeting: The older pilots' seniority allowed them to "bid in" to the jet positions; this meant a boost of $4,500-$5,000 a year (in 1959); and it "takes the older pilot longer, thus costing more money, to transition to the Jet aircraft."[38]

The FAA obtained letters from the Department of Health, Education and Welfare providing data on "sudden attack" (arteriosclerotic, including coronary, heart disease and stroke) for "white males for the year 1957."[39] But these July 1959 letters did not address the fact that, as a congressional report later noted, airline pilots did not fit the norm for "white males" but rather were a "highly select group...more free of serious pathology than a sample of general population of similar age."[40]

Quesada - responding on August 5, 1959 to a request by ALPA's Sayen - admitted that FAA did not have in its possession "a comprehensive library of" reference materials on which the age 60 rulemaking process was based. Instead, Quesada provided a list of 41 documents that he said ALPA should review on its own, while he also said other (unspecified) documents would apply as well.[41] In an unrelated deposition, Reighard revealed Quesada's list of 41 documents to an EEOC attorney who then collected the documents for review. The EEOC attorney found that many of the documents predated World War II, most concerned

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[38] B.W. Hogan, memo (Jun. 24, 1959). (From the Reighard files.) (See Exhibit M.)

[39] HEW letters (Jul. 22 and 27, 1959). (From the Reighard files.) (See Exhibit N.)

[40] See HEW statement on "highly select" status of pilots House Report No. 2080, *Better Management Needed of Medical Research on Aging*, Committee on Government Operations, 89th Cong., 2d Sess. (Sept. 26, 1966), 19.

[41] Quesada, letter to Sayen (Aug. 5, 1959). (From the Reighard files.) (See Exhibit O.)

readily testable physiological functions, only eight had to do with accidents and age, only seven related to mental condition and age, and all of these looked at populations much younger or older than age 60.[42] This list of outdated and largely irrelevant documents, provided at the request of an interested party, gains added significance in light of the fact that the FAA in 1973 lost the entire 1959 docket of age 60 rule materials.

FAA in-house lawyers in October 1959 advised that the available evidence (the retraining data provided by Smith and converted into charts by Quesada) would not support the age rule, and that "scientific or factual justification" of the rule was in fact "not possible." The FAA lawyers recommended a strategy that would obfuscate these attempts to justify the rule by operational data, by making "no presentation" or, if necessary, concocting a defense based on selective use of medical data.[43]

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[42] Elaine Bloomfield, Declaration, *EEOC v. Lockheed Corp.*, U.S. Dist. Ct., Central Dist. Calif., Oct. 22, 1990. (See Exhibit P.)

[43] Memorandum, from Dr. H.L. Reighard, Federal Air Surgeon, to Chief, Medical Standards, October 9, 1959:

> "For approximately three hours on October 7, 1959, the originally prepared chart dealing with the subject of pilot aging were shown to, and discussed with, members of the staff of the general Counsel's Office. ....
>
> "In general, it appeared to be the consensus of the lawyers present that a presentation of this sort would be extremely vulnerable to attack by persons opposed to an age limitation for airline transport pilots. It was felt that this was an attempt to provide scientific or factual justification in a subject area in which such justification is not possible. It was believed also that this would not be an appropriate time from a tactical point of view for this to be used in any manner outside the Agency. Although there were some specific comments with respect to the manner of presentation of specific subject material, most comments had to do with reasons why the subject material itself was inappropriate and indefensible.
>
> "It appeared that the legal staff had two basic recommendations. First, they would recommend that no presentation be made. Second, they would recommend that if a presentation is made it consist of the

Quesada announced the age 60 rule in a news release that stated gratuitously:

> The FAA believes that because of the progressive deterioration of both physiological and psychological functions which normally occur with age...[t]hese deteriorations result in significant medical defects.
>
> The Federal Aviation Agency regulation is based on medical facts that clearly establish that sudden incapacitation due primarily to heart attack and strokes resulting from such defects become significantly more frequent in any group reaching age 60, and such attacks cannot be predicted on an individual basis by prior medical examinations. ....
>
> Other conditions which result from aging...relate to loss of ability to perform highly skilled tasks rapidly, to resist fatigue, to maintain physical stamina to unlearn or discard old techniques, and to apply the rapid judgment needed in changing and emergency situations.[44]

No correlation between these unsubstantiated and conclusory claims based on unidentified "medical facts" and air safety ever was established or even attempted.

When the FAA announced the age 60 rule, it conceded that it was not initiated on the basis of any accident experience of

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presentation of such medical data as is available concerning deteriorations in specific functions...."

(From the Reighard files.) (See Exhibit Q.)

[44] FAA news release, December 5, 1959. (From the Reighard files.) (See Exhibit R.)

older pilots.[45] FAA offered only supposed medical arguments as justification for the new rule. The question and answer paper attached to the news release admitted that the agency's judgments were not based on any authoritative source. It asserted gratuitously:

> From the general knowledge of the processes of aging it is apparent that the functions which make up the skills required of airline pilots begin to deteriorate well before the age of 60.[46]

These assertions of "general knowledge" and their supposed relationship to "the skills required of airline pilots" were supported by no factual data.

In its only public statements on the original preparation and promulgation of the age rule in 1959 (official notices in the Federal Register, news releases, "questions and answers" for the public, etc.), FAA admitted that its action was neither prompted by nor required by actual accident experience. Instead, the agency claimed the rule was needed because of, *inter alia*, "progressive deterioration of certain important psychological and physiological functions with age" (*e.g.*, heart attack and stroke), the fact that a seniority system gave older pilots priority on the "newest, largest, fastest and most highly powered jet aircraft," and the following semi-coherent but dire assertion:

> The possible hazards inherent in the older pilot's medical condition are entirely too serious to determine the question of safety by

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[45] FAA, Basic Questions & Answers About the Maximum Age Limit for Air Carrier Pilots, accompanying press release announcing imposition of the age 60 rule, Dec. 5, 1959. (From the Reighard files.) (See Exhibit S.)

[46] *Id.*

> an attempt to balance the increased chances of an incapacitating attack against the possibility that the pilot might not be engaged in the carriage of a large number of passengers at the time of such attack.[47]

Thus the record makes clear: The age 60 rule was an intrusion into a labor dispute which had minor economic consequences and which had been resolved through normal arbitration procedures. Neither the labor dispute nor its economic effects had anything to do with safety. The age 60 rule was a favor by the FAA's Administrator (Quesada) and delivered to an airline board chairman (C.R. Smith) on the basis of long-standing personal friendship and secret *ex parte* communications, without any medical or safety basis whatsoever. The FAA's repeated references to medical characteristics of the general population (rather than those of the super-select, pathology-free, closely monitored, highly regulated population of air carrier pilots) were intentionally misleading, purporting to justify a rule that the agency knew was not justifiable on the basis of medicine, safety or anything else.

The agency's greatest misdeed was not that it promulgated the age rule in spite of available evidence of the air transport environment's fail-safe design, nor that it did so in the name of unjustified predictions of disaster. Rather the most serious aspect of the FAA's affirmative misconduct was the fact that it prepared, promoted and promulgated the rule in the absence of any credible record. FAA had an affirmative duty - both in its statutory mandate under the FAAct to proceed in the interest of real safety (not fallacies of fear), and its duty under the Administrative Procedures Act of 1947 to consider fully and fairly the whole record before it

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[47] Final Rule, Maximum Age Limitation for Pilots, 24 Fed.Reg. 9767 (Dec. 5, 1959.)

(not some nebulous, secret, and later "lost" record of fiction). By suppressing the true facts set forth above, the FAA breached both of these duties.

FAA Insulated Its Exemption Decisions From Independent Administrative Review.

FAA subverted congressional intent in 1959 when it placed the age 60 rule under a code section immune from independent administrative review, section 601 of the Federal Aviation Act of 1958.

Recognizing the potential for abuse, Congress meant to restrain the power of the FAA Administrator. In debate on the House floor, Representative Meader of Michigan complained, "This Bill vests dictatorial power in one man. In this Bill we are creating an aviation czar."[48] The scope of the congressional intent was made plain in the act's legislative history:

> How to assure the maximum possible safety and efficiency under proper regulations, *impartially enforced,* is one of the major problems in connection with this legislation.
> ....
> It is the intent of this legislation that the Administrator shall discharge his rulemaking powers in a *fair and impartial manner* to promote the public interest and provide for the national defense....[49]

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[48] 104 CONG. REC. 16,087 (1958).

[49] FEDERAL AVIATION ACT OF 1958, H.R. No. 2360, 85th Cong., 2d Sess. (1958), reprinted in U.S. CODE & CONG. & ADMIN. NEWS 3747 P.L. (85-726). (Emphasis added.)

FAA adopted the rule as an operational restriction under what now is Part 121 [50] of the regulations. The decision was to enact the age 60 rule as an operational restriction – with exemption denials *not* subject to independent administrative review. The FAA decided not to adopt the rule as a licensing restriction – which would have seemed more logical, considering that the minimum age limit appears under Part 61, and that the only justifications ever propounded for the rule were medical in nature. The agency chose not to enact the rule as a licensing standard or limitation under the sections then equivalent to the current Part 61 (for the Air Transport Pilot's license) or Part 67 (for the Class I medical certificate). Inasmuch as the only justifications alleged by the FAA in support of its proposed age rule in 1959 were medical in nature, and a complete revision of the medical certification standards was working its way through a parallel rulemaking process during that same time, it would have been appropriate to include the age limitation as part of that rulemaking. That it did not do so strongly suggests the presence of a different agenda.

The FAA's authority to regulate in the interest of safety arose under Title VI of the 1958 FAAct. The two parts most relevant to the age 60 issue are sections 601 and 602. Under section 601 (General Powers and Duties; Minimum Standards; Rules and Regulations), the Administrator could establish, *inter alia*,

> 5. Reasonable rules and regulations governing, in the interest of safety, the maximum hours or periods of service of airmen, and other employees, of air carriers;

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[50] Those sections of the Civil Air Regulations (CARs) inherited in 1959 by the FAA that regulated domestic and international air transportation were parts 40, 41 and 42. Thus, the original age 60 rule appeared in those parts, which later became morphed into the current parts 121 and 135.

> 6. Such reasonable rules and regulations, or minimum standards, governing such practices, methods, and procedures, as the Authority may find necessary to provide adequately for safety in air commerce....[51]

Under section 602(b) (Issuance of Certificate), on the other hand, "ability to perform" is the controlling criteria, and the FAA is required to issue ("shall issue") such certificate to "any person" who seeks one if it finds

> that such person possesses the qualifications for, and...is *physically able to perform* the duties pertaining to, the position... sought...containing such terms and conditions, and limitations as to duration thereof, periodic or special examinations, tests of physical fitness, and other measures as the Administrator may determine to be necessary to assure safety in air commerce.[52]

In considering the rationality of either of these two sections as a basis for a maximum age limit for air carrier pilots, it is helpful to note that the minimum age limit for the ATP license required of an airline captain (23 years) appears under a section 602 regulation (14 CFR 61.153, Airline Transport Pilots [license]; Eligibility Requirements: General). But the Administrator placed the age 60 rule under section 601, where exemption denials would avoid *de novo*, independent administrative review.

Petitions for exemption and appeals from adverse agency actions under section 601 are addressed to the Administrator in the first instance and, if denied, are

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[51] Sect. 601.

[52] Sect. 602(b). (Emphasis added.)

appealed directly to the United States Circuit Court of Appeals, which applies the "substantial evidence" standard of review under FAAct section 1006(a)-(f) or the "arbitrary and capricious" and "abuse of discretion" standards under the Administrative Procedures Act (5 USC 551 *et seq.*). Inasmuch as the individual has no rights of discovery (other than the Freedom of Information Act) in either process, the FAA controls the denial record absolutely. Under this system, petitioner/appellants regularly encounter prohibitive standards if the FAA merely claims that it is acting in the interest of safety.[53] Although the present petition overcomes that presumption by presenting proof

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[53] The extreme degree of deference shown by courts that have considered past appeals of agency denials of exemption from the age 60 rule action may be inconsistent with the congressional intent in enacting the Federal Aviation Act. FEDERAL AVIATION ACT OF 1958, H.R. No. 2360, 85th Cong., 2d Sess. (1958), reprinted in U.S. CODE & CONG. & ADMIN. NEWS 3747 P.L. 85-726): "It is intended that [the Administrator's powers]...shall be exercised in accordance with *constitutional and statutory safeguards* applicable to other agencies of the Government that have been granted similar rulemaking authority by the Congress." Consider *Starr v. FAA*, 589 F.2d 307, 311 (7th Cir. 1978), where the Seventh Circuit said that under the "arbitrary and capricious test, however, *the administrator's discretion is still limited. He is bound by the statutory framework of the program administered by the agency.* Thus, *a court can review an administrator's decision to insure that he neither included in his analysis factors irrelevant to the congressional purpose...nor ignored factors which Congress has indicated are highly significant.*" (Emphasis added. Citations omitted.) Yet the *Starr* court held that "if the Age 60 Rule is reasonable, as it has been held to be, it is not abuse of discretion to reject any individual application for exemption *even if the applicant demonstrates that he personally is a superman immune from the impairments that age normally inflicts.*" *Starr*, at 312-313. (Emphasis added.) More than a decade later, the same court would recognize but still acquiesce in the impossible burden placed on petitioners in *Baker v. FAA*, 917 F.2d 318 (7th Cir. 1990). In *Baker*, while recognizing that the FAA's claims were invalid and that its own evidence actually supported the petitioners, the court conceded, "Admittedly, petitioners in this case face a Catch-22: from one perspective they cannot get exemptions until they show they can fly large passenger aircraft safely, and they cannot show they can fly such planes safely until they get exemptions." *Baker*, at 322.

that the agency's policy of denying age exemptions never was safety-related, it is nonetheless noteworthy that the placement of the issue under section 601 has been prejudicial to all previous petitioners over the past four decades.

Conversely, if the Administrator had placed the age 60 rule under section 602, where it more logically belonged, the exemption appeal process would have been far less likely to produce the outcome desired by those who perceived an economic interest in automatic denials. Under section 602, an individual adversely affected by an FAA decision has a right of appeal to an independent administrative body (originally the Civil Aviation Board, the CAB, now the National Transportation Safety Board, the NTSB) which "shall" conduct a *de novo* review of the entire issue and "shall not be bound" by the Administrator's findings of fact. The issue before the reviewing board then is whether the petitioner "meets the pertinent rules, regulations, and standards" previously established by the FAA. A board finding in favor of the petitioner becomes binding upon the FAA Administrator. Furthermore, at the time the age 60 rule was adopted in 1959, the CAB had power to order the FAA to issue a challenged certificate notwithstanding the regulatory standard if, in the Board's judgment, the appellant was physically able to perform safely.[54]

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[54] In *Schwartz v. Helms*, 712 F.2d 633 (D.C. Cir. 1983), the court upheld the FAA's unilaterally imposed change in this decades-old, congressionally established policy. That court agreed that the FAA could, by a simple change in its own regulations, deny the long-standing and widely - even legislatively - accepted National Transportation Safety Board's authority to order issuance of a certificate - albeit in the specific area of risk of future heart attack - based on the Board's judgment as to ability to perform. This ruling, which has not been followed in any subsequently published decision - even in the District of Columbia Circuit - may be ripe for reconsideration.

When the FAA Administrator decided to place the age 60 rule under section 601, thus blocking independent board review of exemption denials, it was no secret that the CAB would be unlikely to uphold all FAA decisions. In a comment on the revision of medical certification standards that was under discussion at the same time the age 60 rule was being promulgated in 1959, the CAB stated:

> While the Board recognizes that more definitive physical standards may be desirable for administrative and other reasons, we have not found on the basis of accident investigations that they are dictated by urgent safety considerations.[55]

The FAA took note of the CAB's position. It was a well-known fact that, at that time, no change in the medical certification standards of any sort, concerning age or anything else, was needed for pilots.[56] Thus it is not surprising that the CAB was either not asked to comment or, if it did comment, its statement was omitted from the record, in the parallel rulemaking for the age 60 rule. Only under section 601 would Administrator Quesada be assured of an ironclad, impregnable fortress for his regulation. Thus, the Administrator's decision to place the age 60 rule under section 601, effectively precluding *de novo* review of exemption denials, is substantial evidence that FAA assertions regarding the issue were not credible. The only venue in which the FAA's age 60 rule and its rigid no-

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[55] Final Rule, Physical Standards for Airmen: Medical Certificates, Amendment to Medical Standards, 24 Fed. Reg. 7309, 7310 (Sept. 11, 1959).

[56] The Flight Safety Foundation Reports Nos. 1 and 2 (1958) found no need for changing medical standards for pilots, even considering the introduction of jet aircraft). The Report of the Committee on Pilot Ageing (1954) recommended no new standards but rather the use of simulators to test ability of older pilots.

exemptions policy could survive was in a regulatory regime immune from administrative review.

Note: Case Law Upholding Rule is Not Determinative Here.

When the new age 60 rule was challenged in *ALPA v. Quesada*, it was upheld on its merits[57] and on appeal.[58] But the FAA cannot rely on that precedent, because neither the United States District Court nor the United States Circuit Court of Appeals in that case was aware of the fact, now exposed, that the agency's promulgation of the rule was based on intentional misrepresentation of data or fraud. The agency concealed from the courts - as it has for more than four decades - the fact that the rule was an act of personal favoritism that had nothing to do with safety.

The district court appears to have based its ruling largely on Quesada's wartime military record[59] which, while admirable, had no relevance to the case; on a newspaper editorial that was published after the promulgation of the rule at issue;[60] and on an *Aerospace Medicine* commentary that likewise was published after the promulgation of the rule.[61] The commentary was not even based on the medical

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[57] *ALPA v. Quesada*, 182 F.Supp. 595 (S.D., N.Y., 1960).

[58] *ALPA v. Quesada*, 286 F.2d 319 (2nd Cir. 1961).

[59] The short 1961 court opinion lauded "Lt. Gen. Quesada, Commanding General of the 9th Tactical Air Command from the time of the invasion of Normandy until the termination of air hostilities in Europe," for his "outstanding expertise [*sic*]." *Air Line Pilots Ass'n v. Quesada*, 186 F.2d 319, (2nd Cir. 1961).

[60] That *Washington Post* editorial (Dec. 8, 1959) lacked legal relevance; it was not even published until three days after the Dec. 5, 1959 promulgation of the age 60 rule that the court was reviewing.

[61] The Aerospace Medical Association journal column (*Aerospace Medicine*, January 1960, vol. 31, no. 1, page 69) was not published until a month after the age 60 rule was promulgated. Moreover, the article (consisting of 14 sentences, nine of which were quoted from the

association's position, but rather on the newspaper editorial which it quoted at length.

It is ironic that the indexes of past issues of *Aerospace Medicine* show that the journal had rarely published an article having anything to do with pilot retirement age. And the same issue of *Aerospace Medicine* that featured the editorial endorsing the new age 60 rule also contained an abstract of a study by H.W. Orlady that reported:

> Studies to date indicate that (1) chronological age does not adequately measure functional or physiological age. It has been realized that the primary attribute of the air-line pilot, in addition to the basic flying skills, is the mature skill and judgment developed through experience. (2) Present standards and procedures reflect functional or physiologic age regardless of chronological age, and may disqualify pilots of any age. (3) The majority of in-flight incapacitation cases result from such afflictions as acute indigestion, diarrhea, food poisoning, etc., and are not related to chronological age. The author states that the only way to get positive protection against in-flight incapacitation is to (a) maintain present physical and proficiency standards providing for individual testing of pilots, (b) provide a fail-safe crew, wherein on a large aircraft, any pair of flight crew members can safely function in normal or emergency situations in the event of in-flight incapacitation, and (c)

Washington Post editorial) had no factual basis; it was not a peer-reviewed article, and the journal seldom if ever had published any factual report or any article of any kind on the subject of mandatory age retirement for airline pilots. (See Exhibit T.)

> provide an integrated program of initial and recurrent training for all crew members.[62]

The *Aerospace Medicine* commentary[63] cited by the court in *ALPA v. Quesada* simply endorsed the age 60 rule based on (a) the assertion that "accurate, valid tests" did not exist that would allow pilots to fly "after age sixty" and (b) the *Washington Post* editorial of Dec. 8, 1959. The *Post* editorial,[64] cited by the *Aerospace Medicine* article and the court, stated gratuitously, "The medical evidence is ample that a significant number of men over sixty suffer a general impairment of ability and are susceptible to sudden attacks of one kind or another." But neither the editorialists nor anyone else ever offered any data to back up that assertion as it might relate to active commercial airline pilots.

(II) (B) -- THE FAA HAS, FOR THE ENTIRE LIFE OF THE RULE, FROM ITS FIRST GERM OF AN IDEA TO THE PRESENT DAY, REFUSED, ITSELF, TO EITHER COLLECT DATA, MAKE AVAILABLE SUCH DATA AS HAS BEEN COLLECTED, OR ANALYZE DATA ALREADY COLLECTED FOR OTHER PURPOSES IN ANY WAY THAT WOULD THREATEN TO DISPROVE OR EVEN TEND TO DISPROVE THE AGENCY'S FALSE CLAIM THAT THE RULE IS AN INSTRUMENT OF SAFETY.

The FAA consistently has refused to collect, publish or analyze data that easily could be obtained to rebut or refute the false assertion that the age 60 rule serves a safety purpose. One of the most obvious ways to prove the safety

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[62] Abstracts of Current Literature (re: "The Case Against Compulsory Retirement," H.W. Orlady, *The Airline Pilot*, 28 (8):4-11, pp. 11-14), in *Aerospace Medicine* (Jan. 1960), pp. 83-84.

[63] Ludwig G. Lederer, "Report from the President, Aerospace Medical Association," *Aerospace Medicine* (Jan. 1960), 69.

[64] "Pilot Age and Safety," editorial, *Washington Post* (Dec. 8, 1959).

performance capabilities of pilots of all ages is to collect and analyze data. In 1954, the Aero Medical Association's Committee on Ageing recommended the use of simulators to assess the older pilots' ability to perform.[65] The acting chief of FAA's Medical Certification Branch recommended in March 1959 that the agency assemble and share data from that kind of "periodic testing" of "[a]bility to perform adequately under realistic flight conditions."[66] In 1961, the respected Lovelace Foundation, under contract to the FAA to assess a protocol for evaluating the older pilot, provided an overview of a longer-range study, the outline for a preliminary trial effort, and specific recommendations for a seven-point program that could be implemented immediately with existing data and facilities. [67] And 20 years later, in response to a congressional mandate,[68] the National Institutes of Health (through its National Institute on Aging Panel on the Experienced Pilots Study)[69] criticized the FAA in no uncertain terms. This criticism focused on the FAA's decades-long failure to (1) adequately collect data, (2) make available data that had been collected, and (3) analyze relevant data that had, in fact, been collected but for

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[65] Aero Medical Association, *Report of the Committee on Pilot Ageing and Allied Problems.* The committee used the odd spelling of "ageing."

[66] H.L. Reighard, memorandum, *supra* note 29.

[67] Robert Proper, RESEARCH PLANNING STUDY OF AGING CRITERIA, FINAL REPORT, Federal Aviation Agency Project No. FA-904. The Lovelace Foundation for Medical Education and Research, Albuquerque, N.M., July 31, 1961. See pp. 23 (Preliminary Trial Profile Structure), 28 (Outline of a Specific Trial Study), and 39 (Specific Recommendations to the Federal Aviation Administration).

[68] An Act to Require the Study of the Desirability of Mandatory Age Retirement for Certain Pilots, And for Other Purposes, P.L. 96-171 (Dec. 19, 1979), 93 Stat. 1235.

[69] National Institute on Aging, National Institutes of Health, Public Health Service, U.S. Department of Health and Human Services, REPORT OF THE NATIONAL INSTITUTE ON AGING PANEL ON THE EXPERIENCED PILOTS STUDY (August 1981).

other purposes.[70] The NIA panel report recommended that exemptions from the age 60 rule be granted to selected pilots for a "systematic program to collect the medical and performance data necessary to consider relaxation of the current age 60 rule,"[71] and provided a detailed proposal for that process.[72] The FAA never did respond to the NIA panel's criticisms of its past failures. The FAA has refused to comply with the panel's recommendation for a serious study. In fact, later testimony by the Director of the NIA indicates that FAA officials intentionally misled the NIA panel in its 1981 deliberations.[73]

Agency Disseminates False and Misleading Presentation of Inappropriately Derived Safety Data.

The 1981 report of the National Institute on Aging conclusively disproved the FAA's two decades of assertions that there was some sort of medical justification for the age 60 rule.[74] Since then, the FAA has no longer been able to use its discredited medical arguments. Instead, for the past two decades, FAA officials have made equally unjustified assertions that there is a safety basis for the rule. The agency consistently, intentionally and purposefully has disseminated false and misleading presentations of inappropriately manipulated data regarding the risk of accident and older pilots.

FAA officials' concerted misrepresentation of safety performance data began with its misuse of statistics in a

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[70] *Id.* at 17.

[71] *Id.* at 1.

[72] *Id.* at 22-25.

[73] T. Franklin Williams, declaration, *EEOC v. Lockheed Corp.*, CV 90-5253 TJH (Gx) (Distr. Ct., Central Distr. Calif.), Oct. 11, 1990, at 5-6. See *infra* notes 97 to 101 and related text.

[74] See notes 84 to 96 *infra* and related text.

study that had been conducted by Charles F. Booze, Jr. of the FAA Civil Aeromedical Institute.[75] After the NIA report destroyed medical arguments for the age 60 rule, the FAA turned to a distortion of data from the Booze study in order to make it appear that older, more experienced pilots were less safe. The stated purpose of the Booze study had been to ascertain why some general aviation pilots (*e.g.*, doctors and lawyers) had more accidents than other general aviation pilots. In the course of his study, Booze looked at aircraft accident data for only one year - 1974. In two of Booze' several different analyses,[76] he computed the risk of accident for *all* pilots - including doctors, lawyers, housewives, *and airline pilots* - based on experience and age. Because airline pilots (1) exist only in the age brackets *under* age 60, and (2) are by far the safest of all pilots, generating hundreds of thousands of essentially accident-free flight hours, *but are present only in the under-60 age brackets*, the computed risk for those brackets in which they appear *are severely depressed*. That is, they are severely understated as compared to brackets without these thousands of air carrier pilots and their hundreds of thousands of super-safe flight hours - ages 60 and above. This numerically induced depression in *apparent* risk - not a change in *true* risk (either for the air carrier pilots or the general aviation pilots with whom they are "lumped") causes the false and misleading *appearance* of an increase in risk beginning at the point at which the age 60 rule forces the airline pilots out of the population under study - here at age 60. The phenomenon is not controversial, is well and widely understood, is easy to recognize, and it has been explained repeatedly by researchers with impeccable credentials.[77] Booze himself

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[75] C.F. Booze, *An Epidemiologic Investigation of Occupation, Age, and Exposure in General Aviation Accidents*, Office of Aviation, FAA Report No. AM-77-10 (March 1977).

[76] *Id.*, at 12, 14. Data appears in tabular form in Booze' Tables 5 and 7.

[77] See notes 245-251 and related text.

did not consider the data produced in his Tables 5 and 7 as representative of an age-risk analysis. In fact, his only comment on that issue referenced his Table 2 (occupation vs. age) where the phenomenon was far more subtle, and concluded that "[t]he relationship of age and exp ure [flight experience] remain to be examined."[78]

The FAA's presentation of the inappropriately manipulated, plotted Booze data to the NIA Panel on the Experienced Pilots Study misrepresented Booze' findings by depicting the false and misleading appearance of an increase in risk beginning at age 60 - and undoubtedly was recognized as such by FAA officials at the time.

Two years after the release of the NIA report destroying FAA's medical defense of the age 60 rule, FAA paid for a supposed age-risk statistical study by a non-statistician consultant, Richard Golaszewski,[79] who reproduced the inappropriate and misleading age-risk data from the Booze report. Golaszewski produced a report, the Flight Time Study,[80] that perpetuated the Booze misrepresentation of accident data. Despite its having been rejected and refused publication by the FAA's Office of Aviation Safety from the very time of delivery,[81] this flawed and misleading

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[78] *Id.*, at 11.

[79] Richard Golaszewski, B.S. (Accounting) and M.P.A. (Public Sector Management and Finance).

[80] Richard Golaszewski, Acumenics Research and Technology, Inc., *The Influence of Total Flight Time, Recent Flight Time and Age on Pilot Accident Rates*, FAA Order No. DTRS57-83-P-80750 (Jun. 30, 1983). This study was rejected and publication refused by FAA; see notes 81 and 252, and related text.

[81] Kenneth M. Chin, Executive Officer, Office of the Assistant Administrator for Aviation Safety, FAA, letter to Samuel D. Woolsey ([month illegible] 24, 1991). Also see *infra* notes 251 and 253, and related text. (See Exhibit U.)

document has been publicly endorsed and promoted by FAA officials ever since.[82]

The 1981 Report of the National Institute on Aging Proved, Once and for All, the Falsity of the Medical Arguments that the FAA, for More Than 20 Years, Had Asserted as the Rationale for the Age 60 Rule.

As shown above, the FAA adopted and enforced the age 60 rule for secret economic reasons while falsely asserting that the reasons for the rule were of a medical nature. For more than two decades the agency refused to accept or acknowledge the growing body of evidence - produced on a worldwide basis[83] - that there was no medical or other basis for the age 60 rule. Instead, the agency continued to use various medical arguments to defend its original justification for the rule. But in 1981 the nation's premiere scientific bodies investigated those claims, concluding unanimously that the FAA's medical arguments were meritless. After that, the FAA could no longer claim that there was ever any valid medical basis for the rule.

Congress in 1979 directed the National Institutes of Health (NIH) to conduct a study concerning mandatory age retirement for pilots.[84] Pursuant to this mandate, the NIH assigned the task to the National Institute on Aging (NIA), which awarded a contract to the Institute of Medicine (IOM) of the National Academy of Sciences (NAS), to provide an objective study regarding the medical questions related to the issue. The resulting IOM study[85] was reviewed by an

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[82] See *infra* notes 243, 249-252, 257-260 and related text.

[83] See *infra* notes 102, 137-139, 187-189, 199-200, 203-204, 233, 263,273-276, 286, and related text.

[84] P.L. 96-171, enacted Dec. 29, 1979.

[85] IOM Committee to Study Scientific Evidence Relevant to Mandatory Age Retirement for Airline Pilots, *Airline Pilot Age, Health and Performance: Scientific and Medical Considerations.*

18-member panel of experts assembled by the NIA. The NIA panel report[86] made it irrefutably plain, as did the IOM study, that the FAA's 20 years of medical arguments in support of the age 60 rule were baseless. Both the IOM and the NIA panel called for allowing waivers to pilots who wanted to continue to fly beyond age fifty-nine.[87] They recommended that the FAA grant exemptions to the age 60 rule and conduct an objective study of safety performance of pilots of all ages.

The NIA panel expressed strong dissatisfaction over the fact that FAA had never appropriately garnered data on the issue:

> Both the IOM Committee and this Panel have attempted, by every means available to them, to secure and utilize data directly relevant to the questions at hand. This undertaking met with only limited success for three reasons: 1) adequate data have not been collected; 2) in instances where data have presumably been gathered, they are not available; and 3) some relevant data—gathered for other purposes—have not been analyzed in line with the questions facing this Panel.[88]

The NIA panel concluded that "there is no convincing medical evidence to support age 60, or any other specific age, for mandatory pilot retirement."[89] It also found that, although disease and disability increase with age, airlines

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[86] National Institutes of Health, *Report of the National Institute on Aging Panel of the Experienced Pilots Study* (Aug. 1981) (NIA Panel Report).

[87] *Id.* at 1, 22-25; IOM Report (as published in NIA Panel Report) at F-162.

[88] NIA Panel, *supra* note 86 at 17.

[89] *Id.* at 2. (Underscore in original.)

"have achieved a very high level of safety during the past two decades," adding:

> This achievement appears to be the result of a complex interplay among several factors, including striking advances in technology, a complex system of performance evaluation by air carriers and the Federal Aviation Administration, a variably effective system of government and air carrier medical surveillance, and a complex system of regulations designed to minimize risks to the traveling public. .... One inevitable, but unfortunate, by-product of the present system is the unavailability of adequate data concerning the medical status and piloting performance of air carrier pilots past the age of 60 since, under the age 60 rule, persons have not been permitted to continue as air carrier pilots past that age.[90]

Unwittingly relying on distorted data provided by FAA, the NIA panel cited Booze[91] to the effect that pilot accident rates declined until age 60 and then rose. As shown above, the portion of the data in the FAA's Booze report cited to the panel was not relevant to carrier operations; both its general inferential value and the specific references presented to the panel were misleading. Even so, the NIA report said, "The Panel attaches no special medical significance to age 60 as a mandatory age for retirement of airline pilots."[92]

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[90] *Id.*

[91] C.F. Booze, Jr., *An Epiemiologic Investigation, supra* note 75.

[92] NIA Panel, *supra* note 86 at 1.

Debunking FAA's past assertions that the age 60 rule was justified by the danger of pilot incapacitation, the report said:

> The Panel concluded, as did the expert committee assembled by the Institute of Medicine, that on purely medical grounds, age 60 is not an age of special significance with respect to the occurrence of either acute events (such as cardiovascular illness or stroke) or subtle changes (such as those in performance and intellectual function) that may adversely affect pilot performance.[93]

The panel said there was no medical reason "for singling out any other age below or above age 60" for mandatory pilot retirement.[94] Dr. Robert N. Butler (who was Director of the NIA in 1979 when it was asked to evaluate the age 60 rule and in 1981 when the report was issued) recalled later, "Consulting experts to the NIA, the Institute of Medicine and other NIH scientists found *no medical justification* for the rule." He went on to say that the panel "suggested that the retirement at age 60 rule be waived on a limited basis to permit a medical study of older pilots.... Unfortunately, the FAA did not accept our recommendation. As a result, we continue to lose the expertise of seasoned pilots...."[95]

What the NIA panel recommended was that the age 60 rule be continued for pilots in Part 121 flight operations and extended to Part 135 operations, but that a system of waivers allow pilots to continue to fly after reaching age 60

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[93] *Id.*. at 10. (Underscore in original.)

[94] *Id.* at 14.

[95] Dr. Robert N. Butler, When Pilots Turn 60: Experience vs. Age, column, *Washington Post*, July 26, 1989. (Emphasis added.)

while FAA monitors and collects performance data.[96] Years later it was revealed that the only reason why the NIA panel did not call for abolition of the age 60 rule was because panel members had been deceived by FAA officials' assurances that the FAA was going to start allowing waivers to let pilots fly beyond their sixtieth birthday. Dr. T. Franklin Williams, who succeeded Butler as Director of the National Institute on Aging, recalled later:

> At the time the NIA Report was issued, many of its members, if not all, believed that the FAA had already informally agreed to institute a program of post-60 piloting as recommended. Following the NIA Report, the FAA issued an advance notice of proposed rulemaking to institute a study of the medical and proficiency status of airline pilots over age 60. Two years later, however, the FAA abandoned the proposal....[97]

It was almost a year after the publication of the NIA Panel Report when the FAA announced that it was "considering developing and implementing a program" responsive to the NIA panel recommendations.[98] Two years after that, however, the FAA withdrew the notice that it was considering such a program.[99] The FAA notice of withdrawal alluded to economic factors ("retirement and insurance plans which conform to retirement at age 60") but

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[96] NIA Panel Report at 1, 22-25.

[97] T. Franklin Williams, Declaration, in *EEOC v. Lockheed Corp.*, U.S. Distr. Ct. (Central Distr. Of Calif.), CV 90-5253, Oct. 22, 1990, at 5. (See Exhibit U-1.)

[98] Advance Notice of Proposed Rulemaking, Fed. Reg., vol. 47, no. 131 (Jul. 8, 1982), 29782.

[99] Withdrawal of Advance Notice of Proposed Rulemaking, Fed. Reg., vol. 49, no. 72 (Apr. 12, 1984), 14692.

asserted that safety was the reason for calling off the program that would have allowed waivers and monitoring of air carrier pilots beyond the sixtieth birthday.[100] T. Franklin Williams later recalled that "in 1986...the Chief Flight Surgeon and other staff of the Federal Aviation Administration...gave *no medical nor safety reasons* for not going ahead, but indicated that operating staff of the Federal Aviation Administration were opposed."[101] The fact that FAA officials misled NIA panel members is consistent with their other conduct. It appears that the agency never really considered the panel's conclusions and recommendations, and that FAA's stated reasons for abandoning the panel's suggestion amounted to disingenuous disinformation.

The National Institutes of Health repudiated more than 20 years of claims by FAA that medical reasons formed the basis for the age 60 rule. The NIH produced a major study that destroyed two decades of FAA's conclusory, straw-man medical arguments. And now, over 20 years have passed since the NIA Panel Report was published. The FAA has abandoned its discredited medical arguments for the age 60 rule. And yet, to the present day, FAA has failed to act in good faith on the findings and recommendations of the IOM study and the NIA panel.

In the more than two decades since the NIA Panel report was issued, evidence of the FAA's dereliction has continued to accumulate. In 1985, the medical director of TAP-Air Portugal evaluated more than 1,500 pilots at risk – both active and retired – from 1945 to 1983. After noting that the over-60 (retired) pilots had submitted to "the same medical, psychological, and psychomotor tests" as pre-retirement

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[100] *Id.* at 14693.

[101] T. Franklin Williams, testimony, Joint Hearing, U.S. House of Representatives, Select Subcommittee on Aging and the Education and Labor Subcommittee on Employment Opportunities, Sept. 24, 1991.

pilots, the study noted that "64% of the over [age] 60 examinees were absolutely fit for flight duties."[102] In a 1994 study performed under contract to the FAA/CAMI, Dr. Robert Besco determined that "retired airline cockpit crews have a life expectancy of more than 5 years longer than the comparable general population."[103] In 1988, Froom reported:

> The incidence of fatal accident from human error is far greater than that from physical illness. Since inexperienced pilots have a 2-3 times increased incident of mishaps due to pilot error, the estimate of risk of disease related in-flight sudden incapacitation should be balanced by consideration of pilot inexperience. Therefore, it may be preferable to grant waivers to experienced pilots with an increased incidence of disease-related inflight sudden incapacitation than to replace them with novices.[104]

One year later, Jochanan Benbassat introduced the concept of a "decision analytic model" for the establishment of disqualification/waiver standards.

> Although [this study is] deliberately biased in favor of grounding the veteran, the analysis indicates that the risk of sudden death or

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[102] A. Castelo-Branco et al., *Comparative Study of Physical and Mental Incapacities Among Portuguese Airline Pilots Under and Over Age 60,* AVIAT., SPACE & ENVIRON. MED., August 1985, 56(8):752-757

[103] Robert O. Besco, Santya P. Sangal, *A Longevity and Survival Analysis for a Cohort of Retired Airline Pilots,* Professional Performance Improvement, FAA Contract #92-P-13371 (1994).

[104] Paul Froom, M.D. et al. Air Accidents, Pilot Experience, and Disease-Related Inflight Sudden Incapacitation, AVIAT., SPACE & ENVIRON. MED., 278-281, March 1988. (Inconsistent hypthenation in original.)

> incapacitation in an experienced fighter pilot with an incidentally detected illness should be increased ten-fold to 46-fold to justify his or her replacement by a novice.[105]

Whether for fighter pilots or airliner pilots, the balancing of risks model is an appropriate decision making tool. Its use confirms what already is well-known, that FAA's assertions about safety performance of older pilots are profoundly misleading.

FAA disregarded data developed in the Hilton Systems study regarding simulator exercises, a study which proved that the simulators are just as effective as neuropsychological tests.

In 1990, the FAA commissioned Hilton Systems, Inc. to perform a large, multi-part study, for the stated purpose of developing and validating "new technologies or batteries that would allow for alternatives to the [age 60] rule."[106] To fulfill the design objectives of the study, in the fourth and final part of the series,[107] Hilton Systems selected three separate neuropsychological test batteries for their relevance

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[105] Jochanan Benbassat, M.D. et al., Retirement of Fighter Pilots with Incidentally Detected Illnesses: A Decision Analytic Model, JOURNAL OF OCCUPATIONAL MEDICINE, 513-517, Vol 31, No. 6 June 1989

[106] FAA/CAMI Contract No. DTFA-02-90-90125 (1990). The obvious motivation for this study was the serious challenge to the rule by petitioners, and the critical language of the 7th Circuit in its reluctant support of the agency in *Baker v. FAA*: "The FAA should not take this [rejection of petitioners appeal] as a signal that the age sixty rule is sacrosanct and untouchable. Obviously, there is a great body of opinion that the time has come to move on." (917 F.2d 318, 322 (1990).)

[107] Diane T. Hyland *et al.*, Lehigh University, *Age 60 Project: Experimental Evaluation of Pilot Performance*, Hilton Systems Technical Report 8025-4B (January 1993).

to the demands of piloting.[108] Three test flight scenarios also were developed - including an "assessment procedure" deemed by the FAA's own staff to be "more objective, quantifiable, and definitive than the typical proficiency 'check ride.'" These simulator exercises included "complex maneuvers [to be] performed under stress or in novel situations" specifically designed to reveal impairment in older pilots.[109] Hilton Systems staff - assisted by FAA's own staff of simulator experts, instructors and check pilots - then tested forty pilots ages 41-71[110] on these three test batteries and compared the results against their performance on the three simulator scenarios in the FAA's own B-727, high fidelity, "virtual reality" simulator. These comparison tests showed "significant correlation between pilot age and the simulator measure, between pilot age and the predictor tests *and between the predictor tests and the simulator* ...."[111] In short, this massive study of three different, specially selected neuropsychological test batteries, administered with the assistance of and under the direct supervision of expert FAA staff, confirmed the virtual reality simulator approved by the FAA in its 1981 Advanced Simulation regulations[112] as a valid test of impairment in older airline pilots during all flight situations, including complex

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[108] *Id.* at 3-3. The three neuropsychological test batteries were COGSCREEN, WOMBAT, and Flitescript.

[109] *Id.*, at 3-1, 3-2, 5-1.

[110] All were experienced pilots having logged a minimum of 5000 hours flying. From among the 40-pilot total population, the investigators selected 23 (similar age range as the 40) with both total and recent flight experience in the B-727 aircraft comparable to that of an active air carrier pilot for its air carrier pilot vs. age assessments.

[111] Hyland et al., *Age 60 Project: Experimental Evaluation of Pilot Performance*, Hilton Systems Technical Report 8025-4B, 5-3 (January 1993).

[112] FINAL RULE, ADVANCED SIMULATION, 45 Fed. Reg. 44176 (Jun. 20, 1980).

maneuvers performed under stress and in novel situations.[113]

And yet the FAA, when soliciting public comments on this massive effort to develop "alternatives to the [age 60] rule,"[114] buried these findings in favor of a minor part of the overall study, the Consolidated Database Experiment,[115] a segment that the FAA itself had declared at the outset "was not intended to finally establish causal relationships between age and accident rates" because "the quality of the available data will not support such an investigation."[116] Despite this severely limiting caveat, the FAA declared publicly that comment on this study was solicited in its "consideration [of] whether to initiate rulemaking on the . . . Age 60 Rule."[117] Moreover, in this announcement, FAA disingenuously misrepresented the facts as reported in the discredited, rejected, and publication-refused 1983

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[113] More than 30 years after the fact, FAA finally fulfilled the specific recommendation made by the Lovelace Foundation in its 1961 review of pilot evaluation protocols. But the agency still refuses to acknowledge the Lovelace report, which said:

> 6. Using its own research facilities, the [FAA] should begin a program to perfect a quantitative method of evaluating flight simulator performance in highly skilled pilots to serve as a psychophysiological instrument for validating the significance of a pure medical index . . . [as] a true index of deteriorating performance capabilities with advancing age.
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> (Lovelace Foundation, Research Planning Study of Aging Criteria: Final Report, July 31, 1961, at 40.)

[114] THE AGE 60 RULE, 58 Fed. Reg. 21336, April 20, 1993.

[115] Edwin J. Kay *et al., Age 60 Project, Consolidated Database Experiments, Final Report*, Hilton Systems Technical Report 8025-3C(R2) (March 1993).

[116] Statement of Work: Pilot Data Consolidation Effort: Studies on Mandatory Retirement Age for Pilots, 2.

[117] 58 Fed. Reg. 21336, April 20, 1993.

Golaszewski study as if they were those of the 1981 NIA panel study:

> The NIH study included data collected from 1976-1980 and was obtained from FAA medical records and from a [NTSB] data base. The study compared the accident rates for each age group after adjusting for the amount of total and recent flying done by different age groups. The methodology expressed accident rates as the number of accidents per flight hour. This study indicated that the accident rates for pilots whose medical certificates permitted them to fly as commercial airline pilots had a substantially higher accident rate after age 60 than at younger ages.[118]

Not only does this passage not accurately describe the NIA panel study, but it is lifted virtually verbatim from the FAA's misrepresentation to the Seventh Circuit in *Baker v FAA* regarding the (previously discredited and publication-refused) Golaszewski study:

> The Flight Time Study collected data covering the years 1975 through 1980 obtained from FAA medical records and from a [NTSB] data base. The Flight Time Study compared the accident rates for each age group after adjusting for amount of total and recent flying done by different age groups. . . . [This study] expresses accident rates as the number of accidents per flight hour. . . . The statistics indicate that once pilots reach approximately age 60, the

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[118] 58 Fed. Reg. 21336, April 20, 1993.

> accident rate climbs even though experience also climbs. The Flight Time Study does focus on subsets of the pilot population who have passed medical standards required of airline pilots.[119]

The NIA Report, on the other hand, referenced the 1977 Booze study.[120] In this study, the data was from 1974 only,[121] the accident rate was expressed as "rate/1000 [pilots]" (not per flight hour);[122] and there was no segregation by medical class - only age and flight time.[123] And, as for an assessment of air carrier pilots, Booze declared only that "[a]irline pilots, on the other hand, have the highest cumulative experience of any *group but continue to have low accident rates.*"[124] Further, Booze made no analysis of age, *per se*, declaring that "[t]he relationship of age and exposure remain to be examined."[125] Moreover, when referencing the Booze study, the NIA report specifically noted that "general aviation pilots . . . whose

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[119] Brief of Respondents, in *Baker v FAA*, Court of Appeals for the 7th Circuit No. 89-2524, submitted April 25,1990, at 6, 7. (Case reported at 917 F.2d 318 (7th Cir., 1990).)

The discredited, rejected and publication-refused Golaszewski Flight Time study did not report directly on "subsets of the pilot population who have passed medical standards required of airline pilots." The paper provided data only on "all pilots" and pilots with a 3rd class medical certificate. At footnote 5, page 10, however, Golaszewski stated, "Accident rate data for Class I and Class II pilots (as a group) are derived from [*sic*] subtracting the Class III pilot data from that for all pilots."

[120] NIA Panel, *supra* note 86 at 2, 5, 9.

[121] Booze *supra* note 75 at 5.

[122] NIA Panel, *supra* note 86 at 5, fig. 2. See also, Booze, *supra* note 75 at 12, 14,, Tables 5, 7.

[123] *Id.*

[124] Booze, *supra* note 75 at 10. (Emphasis added.)

[125] *Id.*, at 11.

experience [*not medical class*] most closely parallels that of professional pilots [*not airline pilots*] . . . have declining accident rates until the age of 60, after which those trends reverse."[126]

FAA's only possible reason for burying the Hilton Systems' Experimental Evaluation of Pilot Performance data (from a study that was expressly intended to develop and prove the simulator to be a viable age-60 assessment device) evidently was that it was successful. The FAA's reason for burying of this data was as disingenuous as its choice of the Consolidated Database Experiments - specifically declared at the outset to be inadequate for the declared purpose - for public comment. FAA officials obviously intended the Consolidated Database Experiments to validate the previously discredited Golaszewski study - and were dissatisfied when it did not. The FAA's Statement of Work identified only the Golaszewski study as prior "statistical" analyses, failed to disclose its discredited and publication-refused status, and misrepresented its "findings" as to the "Class I and Class II pilots" even though no data had been presented for these classes, and misrepresented as a "key assumption" that Golaszewski had considered that recent and total flight times in the FAA Medical History File and NTSB accident database were equivalent. Hilton Systems was ordered to "utilize improved statistical methodologies and address issues raised in prior studies" - with the Golaszewski study being the only "prior [statistical] studies" (*sic*) identified.[127]

However, like the earlier analysts, Edwin Kay (statistician/author of the Consolidated Database Study)

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[126] NIA Panel Report *supra* note 86 at 2.

[127] FAA, Statement of Work: Pilot Data Consolidation Report: Studies on Mandatory Retirement Age for Pilots, 1,2.

harshly criticized the Golaszewski study,[128] and refused to replicate its analyses of heterogeneous populations[129] - different classes of medical certification combined together for analysis - and provided no support for the FAA in his original submission. Adhering rigidly to strictly homogenous medical classifications, Kay found and reported: "[T]he data for all the various groups of pilots were remarkably consistent in showing a modest decrease in accident rate with age." And specifically as to airline pilots: "Our analyses provided no support for the hypothesis that the pilots of scheduled air carriers had increased accident rates as they neared age 60." As an overall conclusion - in the originally submitted "final product" - Kay said: "It was as easy to conclude that the FAA's system improved the composition of the groups over time as it was to conclude that pilots' performance improved with age."[130]

Recognizing the negative impact this conclusion would have on the FAA's ability to defend its age rule, the FAA/CAMI contract monitor returned the study to Kay with a "request" to find an age that the FAA could use in its defense of the rule.[131] Reluctantly complying, Kay reviewed the already completed analyses by eye (sometimes called "data snooping"), selected short segments from four larger sets of medical Class II and III pilot data for "post hoc" reanalysis, but treated them as "planned" tests "to maximize the probability of finding even hints of an increase in

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[128] Kay, *supra* note 115 at 2-1 - 2-3.

[129] *Id.*, 4-1. "A number of principles guided the analyses. First, it was inappropriate to aggregate data across medical classes, because this created heterogeneous groups with misleading accident rates."

[130] *Id.*, 6-2. This final statement at the end of the second full paragraph, page 6-2 marked the end of Kay's study as originally submitted.

[131] Samuel D. Woolsey, letter (certified mail with return receipt) to Ms. Pamela Della Rocco, Aug. 19, 1993. (Subject: Age 60 Project, Consolidated Database Experiments.)

accident rate with age for pilots near age 60," even remarking, "It is quite likely that any trend detected is spurious."[132] Relying on these new, after-the-fact tests of visually selected snippets of data, the author created a new - and now FAA acceptable - concluding statement: "Taken together, these [new] analyses give a hint, and a hint only, of an increase in accident rate for Class III pilots older than 63 years of age. This suggests that one could cautiously increase the retirement age to 63." [133]

As with the misleading Golaszewski presentations from a decade earlier, FAA promoted this likely spurious "hint" of an increase at age 63 as if it were both substantial and true. It was not well received in the international community. A brief reference to the FAA's Age 60 Project appeared in an International Civil Aviation Organization (ICAO) Air Navigation Commission working paper, but notes only the database study and the reported conclusion "one could cautiously increase the retirement age to 63."[134] The favorable pilot-simulator evaluation results - the declared objective of the entire project and its most striking and beneficial result - which apparently had not been pointed out by the FAA, thus were not mentioned in the ICAO document.

The "age 63" comment did reappear, however, in a U.S. Department of Transportation (DOT) appropriations bill for fiscal 2000 reported out by the Senate Appropriations Committee.[135] The Committee noted that it had asked the

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[132] Kay, *supra* note 115 at 6-2 - 6-3.

[133] *Id.*, 6-3. See also Affidavit of Samuel D. Woolsey, March 27, 1996. (Regarding statements by Pam Della Rocco, FAA Contract Monitor.)

[134] ICAO Air Navigation Commission, *ANC Task No. MED-7101: Upper age limits for flight crew members*, AN-WP/6940, 3, 18/10/94.

[135] U.S. Senate Committee on Appropriations, *Department of Transportation and Related Agencies Appropriations Bill, 2000*, S. Rep. 106-55, 106th Cong., 1st Sess., 79-80 (May 27, 1999).

FAA "why the United States should not 'cautiously increase the retirement age to 63' like other countries have for commercial aviation." The rationale underlying this original query is without foundation.[136] The question begs explanation. No "other countries" in the ICAO community are currently on record as having adopted age 63 as a maximum age limit for airline pilots.[137] In a 1996 survey of ICAO member States, of 57 States permitting airline pilots to fly beyond age 60, seven reported allowing flight to age sixty-three;[138] however, in an ICAO listing four years later for the year 2000, none reported 63 as a statutory or regulatory upper age limit.[139]

Nevertheless, the Senate Committee ordered the FAA to determine the risk of all professional pilots ages 60-63 and compare that risk to the risk of all professional pilots in overlapping age brackets (*i.e.*, 57-60, 56-59, 55-58 . . . 21-24) under that age.[140] Like the rationale underlying it, the order is seriously flawed. In the first place, it turns the concept of inferential statistics on its head. The Committee, by the nature and circumstance of its order, suggests that, for the

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[136] The statement "like other countries have [done]" is so contrary to reality as to suggest the need for an inquiry into sources of influence on the Appropriations Committee's actions.

[137] ICAO, Supplement to Annex 1 - Eighth Edition, *Personnel Licensing* (June 2000).

[138] ICAO Air Navigation Commission, *ANC Task No. MED-7101: Upper age limits for flight crew members*, AN-WP/7089, 2, A-1 - A-3, 15/2/96. Of the seven, all had a regulatory limit of age 60, but informally permitted flight to age 63. None of the seven were major participants in international aviation. They were: Finland, Iceland, Japan (since raised to 65 by legislation), Oman, Singapore, Thailand, and United Arab Emirates.

[139] *Personnel Licensing* (June 2000). Thailand listed age 61, Panama 62. The remainder reported either no age limit, age 65, or the UK/JAA 60-65 limit.

[140] S. Rep. 106-55, *supra* note 135 at 80.

narrowly selected group of the most highly trained, experienced, and qualified pilots, most thoroughly and frequently tested to the highest regulatory standards, and most closely and carefully scrutinized at all times and in all areas, their risk characteristics can be inferred from the mass of "all" commercial and non-commercial pilots. The supposition is absurd. Kay (1993) revealed that the differences in risk between pilots known to be airline pilots and mere "commercial" pilots (medical Class II) varied from 22,000% (age 35-39) to 9,200% (age 55-59).[141] Even an introductory text on statistics declares that: "Inferential statistics makes it possible to draw inferences about what is happening in the population based on what is observed in a sample [drawn] from that population." Inferences do not go from the general to the particular, as here. The error of this inappropriate application of statistical methodology is clear:

> [A]ppropriate techniques of inferential statistics are used to estimate the values of *population parameters* from sample statistics. If the sample is properly selected, the *sample statistics* will often give good estimates of the parameters of the population from which the sample is drawn; if poorly chosen, *erroneous conclusions are likely to occur*.[142]

The Committee effectively ordered the FAA to replicate the procedural flaw and its erroneous results that destroyed the usefulness of the earlier (rejected and publication-refused) Golaszewski Flight Time study. The flaw underlying the Committee's directive – as it was in the FAA's inappropriate use of the Golaszewski data – was to analyze heterogeneous

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[141] Data for airline pilots from Table B-6B, for medical Class II pilots from Table B-7B. Risks (accidents/100k hrs) for age 35-39: 0.03 vs 6.59, for ages 55-59: 0.06 vs 5.65.

[142] Joan Welkowitz *et al.*, INTRODUCTORY STATISTICS FOR THE BEHAVIORAL SCIENCES 6 (3rd ed. 1982). (Emphasis added.)

pilot populations demographically skewed across age 60 because of the FAA's age 60 rule.[143] As discussed below, these same flaws permeated the Golaszewski Flight Time study; their misleading effects are common knowledge in the scientific community.[144] The Committee's order thus was improper on its face as it called for replication and vindication of the previously discredited Golaszewski study.

As revealed in the discussion of the Golaszewski study *infra*, the FAA was on fair notice in year 2000 that the Appropriations Committee's directive was flawed in theory and practice. For this reason, the FAA was derelict in having failed to inform the Committee of the latter's misunderstanding of the status of pilot age limits in the international community, and to negotiate with the Committee for a more relevant and realistic analytical protocol. The fact that it did not do so - combined with its enthusiastic compliance with an order it well knew to be thoroughly flawed and guaranteed to produce misleading results - is *prima facie* evidence of FAA's intent - perhaps even its complicity with the Committee - to mislead. Responding to the Committee's order, FAA produced four studies, of which only the fourth was directly responsive to the congressional mandate.[145]

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[143] See discussion beginning at page 23 *supra*.

[144] While it may be inappropriate to expect the Appropriations Committee (*supra* note 135) to be fully cognizant of the international aviation's stance on age 60, given their obvious interest in the age 60 rule and its demographic effects, the Committee certainly can be held responsible for knowledge of the fundamental statisitcal flaws embodied in its order.

[145] Dana Broach et al., *Pilot Age and Accident Rates Report 4: An Analysis of Professional ATP and Commercial Pilot Accident Rates by Age*, FAA/CAMI OAM research task AAM-00-A-HRR-520, September 6, 2000.

Three additional reports are indirectly relevant: Report 1: David Schroeder et al. *Pilot Age and performance, An annotated bibliography*

The FAA's fourth study, *Pilot Age and Accident Rates Report 4: An Analysis of Professional ATP and Commercial Pilot Accident Rates by Age*, following the Committee's directive, replicated the earlier Golaszewski findings precisely. The author explicitly denied this perfect match by declaring, "The results of this [Report 4] are *generally consistent with* the conclusions reported by Golaszewski (1983, 1991,1993) *despite the use of different methods and samples*,"[146] However, *all respects material to the result to which he refers* - comparing risk of professional pilots above and below age 60 - *his pilot categories* (pilots holding medical Class I and II certificates), *his age ranges* (above and below age-60), *population demographically skewed at age 60* by the Age 60 Rule, itself, *and his analytical methodology* ((accident count) / (hours flown) / 100,000 = rate of accident per 100,000 hours), were lifted from the rejected and publication-refused Golaszewski Flight Time Study. Moreover, throughout the remainder of his report, the FAA-employed principal author favorably compared his findings to those of Golaszewski. And Broach made the bizarre claim that the "analyses reported in this study are based on a sample working population of airline pilots [*actually the universe of all professional pilots*] that is very similar to the working population of airline pilots subject to the Age 60 Rule [*actually a very restricted subset of pilots*]."[147] Not surprisingly, Broach found a (false and misleading) "statistically significant" increase in risk for the age 60-63 age group.

(1990-1999), FAA/CAMI OAM research task AAM-00-A-HRR-520, undated. Report 2: Dana Broach, *Pilot Age and Accident Rates: A Re-analysis of the 1999 Chicago Tribune Report and Discussion of Technical Considerations for Future Analyses*, FAA/CMI OAM research task AAM-00-A-HRR-520, undated. Report 3: Dana Broach et al., *An Analysis of Professional Air Transport Pilot Accident Rates by Age*, FAA/CAMI OAM research task AAM-00-A-HRR-520, July 21, 2000.

[146] Report 4, pp. 2, 44. (Emphasis added.)

[147] *Id.* at 47.

Obviously pleased with these results, FAA arranged to have the author, Broach, present these flawed, inappropriate, and misleading findings at the annual Aerospace Medical Association Meeting, Reno, Nev., May 6-10, 2001. In a subsequent rebuttal, Samuel D. Woolsey, J.D., a long-time researcher of the age 60 rule and webmaster of a free access, public service website dedicated to the subject, addressed a letter, critical of the FAA/Broach presentation, to the president of the Association.[148] Explaining his purpose in writing, Woolsey stated:

> I believe it important that those who provide information to the public insure its accuracy, and maintain an objective neutrality with respect to controversial subjects. . . . Thus, I respectfully object to your Association's having provided a forum at its year 2001 convention for the FAA's and CAMI's Dr. Dana Broach to present an excerpt from the fourth and most seriously flawed of those studies.[149]

Woolsey's factual representations are found to be highly reliable, his references to other materials accurate and relevant, and his analysis of the weaknesses and strengths of the analytical protocols of the various studies compared valid. Petitioners hereby incorporate Woolsey's letter to the President of the Aerospace Medical Association into this petition.

The agency's failure to make reasoned decisions based on actual data was reflected in an analysis by FAA Federal Air

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[148] Samuel D. Woolsey, letter to Donald C. Arthur, M.D., J.D., Ph.D., President Aerospace Medical Association, Nov. 20, 2001. Access this letter, and many of the cited references, at: www.age60rule.com.

[149] *Id.*

Surgeon P. V. (Pete) Siegel as long ago as 1972: "The fact that we have not published logic and statistics is no valid proof that we are unfounded, outdated, or inactive," his analysis said. The passage concluded, "There are several advantages to the aviation community in allowing pilots beyond 60 to demonstrate their qualifications for a first-class medical certificate that would not be possible should there be an age limit for medical certificate issuance." That conclusion appeared to offset the logic of Siegel's accompanying transmittal memorandum, which said, "We must conclude from the arguments presented in opposition to the Age 60 rule that no valid reasons exist that would offset the rule's positive impact upon flight and public safety."[150] Siegel's assertion that the rule had a positive impact on flight and safety was, however, not based on logic, statistics or data of any sort.

(II)(C) - - THE FAA HAS, FOR THE ENTIRE LIFE OF THE RULE - FROM ITS FIRST GERM OF AN IDEA, TO ENACTMENT TEN MONTHS LATER, TO THE PRESENT DAY - ACTED INTENTIONALLY, CONTINUOUSLY AND PURPOSEFULLY TO FABRICATE AND DISSEMINATE FALSE AND MISLEADING DATA TO SUPPORT THE RULE AND/OR TO BAR THE PRODUCTION OF EVIDENCE THAT WOULD DISPROVE OR EVEN TEND TO DISPROVE ITS FALSE CONTENTION THAT THE RULE WAS AN INSTRUMENT OF SAFETY.

At no time since the establishment of the age 60 rule has the FAA allowed the production or dissemination of meaningful data that would rebut or refute its false assertions that the age 60 rule has a safety purpose.

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[150] P.V. Siegel, Federal Air Surgeon, memorandum, re: Age 60 Hearing, January 17, 1972. (From the Reighard files.) (See Exhibit V.)

FAA ignored expert advice in establishing its so-called Georgetown Clinical Research Institute (GCRI) study in 1960, and later misrepresented both this study and its companion Lovelace Foundation Study of Physiologic and Psychologic Aging in Pilots as "major studies" of the pilot aging issue.

FAA in the 1960s conducted a useless in-house study that it misleadingly titled the Georgetown Clinical Research Institute study while declining to pursue more promising research that had been proposed to it under contract by the Lovelace Foundation.[151] GCRI (not Georgetown University) spent five years accumulating unorganized data, primarily on air traffic controllers,[152] some of whom were pilots, in a project it later admitted (following an inquiry by the Government Accounting Office, and on the eve of an investigation by the U.S. House Committee on Government Operations) came up with no usable data, no statistical design for analysis of data, and no analysis.[153] In its 1961 comprehensive report to the agency, the Lovelace Foundation for Medical Education and Research had recommended that the FAA begin with a seven-point

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[151] Robert Proper, *supra* note 67.

[152] U.S. House Committee on Government Operations, BETTER MANAGEMENT NEEDED OF MEDICAL RESEARCH ON AGING, House Report No. 2080, 89th Cong., 2d Sess. (Sept. 26, 1966) (H.R. 2080), 22:

"The FAA also has a serious interest in reassessing its retirement policy in regard to FAA air traffic controllers. At present controllers are under the regular Civil Service retirement system, but FAA has reasons to believe that a more flexible retirement policy is needed. The FAA-GCRI project is aimed specifically at this problem."

This observation correlates well with the historical situation leading up to the creation of the FAA in 1958 and its revision of medical certification standards in 1959. Recall, for example, the Harding Commission report of 1956, the Flight Safety Foundation reports of 1958, and the legislative history of the FAAct of 1958, discussed above.

[153] H.R. 2080, *id.* at 4.

program that would use the "most exacting" techniques and routine measurements in a battery of tests to produce the FAA's desired "Physiological Profile Aging Ratio (PAR)," to replace FAA's admittedly arbitrary age 60 cut-off with individualized testing.[154] Among the seven points were:

> 1. Stimulate interest in other agencies for a joint program to minimize costs.
> 2. Begin collecting and analyzing public data already in existence.
> 3. Access the extensive data in military pilot service records.
> 4. Access the existing data from its own (FAA) pilot records.
>
> ....
>
> 6. Perfect a quantitative method of evaluating flight simulator performance.[155]

FAA rejected all the enumerated suggestions, as well as the foundation's proposal to begin with a two-year test program prior to a longer-term study.[156] Contrary to the agency's repeated public assertions, and notwithstanding the stated purpose of its failed GCRI project, the FAA has been unalterably opposed to the development of a physiological profile that could be a substitute for the arbitrary cut-off based on chronological age.

When the FAA voluntarily terminated its wasteful GCRI project in 1966, the Federal Air Surgeon, P.V. Siegel, informed the House investigating subcommittee that "the FAA would now take advantage of the results of the NIH-

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[154] Lovelace Research Planning Study, *supra* note 113 at 23.

[155] *Id.* at 39.

[156] *Id.* at 23, 28, 39. See also H.Rep. 2080, *supra* note 3 at 3, 12, 15, 19, 20.

sponsored [Lovelace Foundation] study."[157] Less than six months later, however, in a "Dear Al" letter to the director of the Lovelace project, FAA's Siegel asked that the foundation end its examination of the older pilot in favor of the younger pilot - which, sensibly, Lovelace refused to do. Siegel wrote to Lovelace:

> It is generally accepted that the impetus for initiating your study (and ours) was the adoption of the 60-year rule with the resulting pressure to develop a means of selecting pilots who might be able to fly beyond the age of 60.... Instead of a primary concern with the upper age bracket - selecting those who are above the average 60 year old with the idea of allowing them to fly past this age - we should [instead] concern ourselves with selecting out those in the lower age group who measure below the average.[158]

Following review of the Lovelace study's annual progress report for 1968, showing preliminary results extremely favorable to the health and fitness of the older air carrier population,[159] Siegel arranged a staff visit to the

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[157] *Id.*, at 4. Statement by Dr. Siegel to congressional subcommittee investigators on Aug. 9, 1966. After the FAA rejected its recommendations, the Lovelace Foundation submitted these same proposals in a request to, and was granted funding by, NIH for a longitudinal study to, *inter alia*, produce the FAA's desired "Profile Aging Ratio" through a study of "normal" human aging (*i.e.*, aging absent pathology) using air carrier pilots because of their recognized "super-select" health status and longer lives. See H.R. 2080, *supra* at 7, 13, 15, 19, 23.

[158] P.V. Siegel, letter to Dr. A.H. Schwichtenberg (Jan. 12, 1967).

[159] Lovelace Foundation for Medical Education and Research, 1968 ANNUAL PROGRESS REPORT: STUDY OF PHYSIOLOGIC AND PSYCHOLOGIC AGING IN PILOTS, N.I.H. Grant No. HD 00518 (Sept. 3, 1968).

foundation.[160] During this visit, the FAA attendees first challenged the source, accuracy and validity of the foundation's findings,[161] then pleaded with the foundation representatives to restrict the distribution of the Lovelace data,[162] – or at least agree not to testify against the FAA if the age 60 rule were challenged.[163] Moreover, on the specific question of whether the Lovelace data would support a waiver of the rule, the FAA group's leader, C.I. Barron, M.D.,[164] refused to allow open discussion.[165]

In a subsequent report to Siegel regarding this visit, Barron declared the Lovelace Foundation's findings irrelevant to the age 60 rule issue.[166] An internal FAA memorandum[167] assessing this letter, correspondence between Siegel and NIH,[168] and handwritten comments by Siegel to Reighard,[169]

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[160] Lovelace Presentation to the *Ad Hoc* Sub-Committee on Pilot Aging: Federal Air Surgeon's Committee (Dec. 9, 1968).

[161] *Id., passim.* But, *e.g.*, for questions regarding incidence of myocardial infraction, see pp. 9-11.

[162] *Id.* See, *e.g.*, pp. 173-174.

[163] *Id.* See, *e.g.*, p. 175.

[164] Barron was not an employee of the FAA. Instead, he was Chief Medical Officer, Lockheed-California Co., a personal friend of Siegel, and chairman of the Federal Air Surgeon's *ad hoc* subcommittee on pilot aging.

[165] Lovelace Presentation, *supra* note 160 at 174-175.

[166] C.I. Barron, letter to Peter V. Siegel (May 1, 1969). (From the Reighard files.) (See Exhibit W.)

[167] Gordon K. Norwood, M.D., Chief, Aeromedical Standards Div., memorandum to P.V. Siegel (July 30, 1969). (From the Reighard files.) (See Exhibit X.) Note Norwood's concern for expected litigation on the age 60 issue to be led by Atty. F. Lee Bailey.

[168] John P. Sherman, Ph.D., Deputy Director, NIH, letter to P.V. Siegel (Jan. 27, 1970). (From the Reighard files.) (See Exhibit Y.)

[169] Pete (P.V. Siegel), handwritten note to Rick (Homer Reighard) (undated), referring to the Sherman letter, *id.* (From the Reighard files.) (See Exhibit Z.)

all indicate that the Barron letter (or its substantive content) was "leaked" to NIH[170] and contributed to the termination of NIH funding for the Lovelace studies in 1969. Due to this premature termination, no conclusive "findings" were ever derived or published (as in the case of its companion GCRI study).

However, in 1989 - twenty years later - FAA officials informed the Government Accounting Office that both FAA's voluntarily abandoned GCRI study and the prematurely terminated Lovelace Foundation study (neither of which had placed any usable data in the public domain[171]) were "major studies" that the FAA had "relied on" in "rejecting alternatives to the Age 60 Rule."[172] In yet another instance of confusing statements, FAA advised House committee investigators in 1966 that it had expended some $1.2 million on its GCRI effort,[173] but informed Congress in 1979 that the sum had been more than double that amount, $2.5 million.[174]

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[170] Sherman, *supra* note 168, wrote:

> "If we were to release the requested information to the [FAA]...with the understanding that it would not be placed in the public domain, it would be of little value to you. I say this because I believe it is not information alone you need, but rather permission to use it in court. *I would think the site visit by you and your consultants in November 1968 [sic] provided you with a fairly complete scientific evaluation of the Lovelace Study.*" (Emphasis added.)
>
> Siegel's evaluation of Sherman's position to Reighard stated: "I think this evades the issue and is sort of like a lecture down to us. In Earl Carters [*sic*] Report he followed the main points of the Review groups [*sic*] comments in his comments to us. So we have the body of it anyway." (See Exhibit Z.) Earl Carter had attended the 1968 Lovelace Foundation presentation as an FAA representative.

[171] See Barron, *supra* note 166. (FAA regarded the Lovelace study as not even relevant to the age 60 issue.)

[172] FACT SHEET, AVIATION SAFETY: INFORMATION ON FAA'S AGE 60 RULE FOR PILOTS (GAO-RCED-90-45FS) 17 (Nov. 1989).

[173] H.Rep. 2080, at 3.

[174] Homer Reighard, Federal Air Surgeon, statement, in AGE

In an admitted effort to thwart pending legislation that would have mandated an increase in the age limit,[175] Federal Air Surgeon Reighard and FAA Deputy Administrator Quentin Taylor arranged to have a no-bid, sole-source contract for an "objective" analysis of the age 60 rule issued to a former Federal Air Surgeon, Robert Goddard. But Reighard and Taylor both knew that Goddard, who had been Reighard's supervisor, was a strong advocate of the age 60 rule.[176] When the propriety of Goddard's selection was challenged publicly, Reighard and Taylor sought, without success, to secure a credible, independent agency to review and validate the resulting study.[177]

In a deposition years later, Reighard was asked about the fact that FAA Administrator Bond had been critical of Reighard's judgment in appointing Goddard to conduct that study. Reighard again confirmed that what the Administrator was concerned about was "the appearance,

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DISCRIMINATION AGAINST AIRLINE PILOTS, 1979: HEARINGS BEFORE SELECT COMMITTEE ON AGING, U.S. House, 96th Cong., 1st Sess., Comm. Pub. No. 96-183 (1979), at 51.

[175] Dave Yader, Office of the Secretary of Transportation, memorandum to the Secretary (Oct. 11, 1979) (from the Reighard files) (see Exhibit AA):

"In *an attempt to head off legislative action*, FAA earlier this year initiated its own study of the mandatory age retirement rule, with a report due by the end of this year. *However, because of the composition of the study group this has not satisfied the airline pilots seeking to modify the rule.*" (Emphasis added.)

[176] H.L. Reighard, memorandum to AGC-400, Attention: AGC-420 (FAA General Counsel's Office) (Jan. 14, 1980), at 5. (Subject: Background information on Contract No. DOT-FA79WA-4335 with Goddard & Associates.) (From the Reighard files.) (See Exhibit BB).

[177] *Id.* at 6, 7. [From the Reighard files.] Neither the NIA nor the American Medical Association would agree to do so. Also, William H. Hark, M.D., FAA Office of Aviation Medicine, Memo for the Record, to AAM-530 (Aug. 21, 1979) said: "NIA will not consider doing a critique of [Dr. Goddard's "Age 60 Study"]...or doing any other study of this question until the legislative proposals now before Congress have been disposed of."

the political effect" of appointing a biased advocate to conduct the purportedly objective study.[178] The fact that the FAA's Federal Air Surgeon and Deputy Administrator would award such a contract to a known supporter of the rule for the express purpose of "heading off legislation," and that the Administrator became concerned not with the contracted study's technical validity, but rather with the appearance and politics of Reighard's action, is further *prima facie* evidence of the lack of credibility of the agency on the issue.

Despite its purely political purpose, the clear bias in Goddard's selection, and the resulting controversy - both internal and external - as well as the refusal of every independent agency asked to either review or validate its findings, FAA officials nevertheless falsely told the congressional Government Accounting Office a decade later that the Goddard study had been one of seven "major studies" the FAA had "relied on" in "rejecting alternatives to the Age 60 Rule."[179]

(II) (D) - - PILOT INCAPACITATION, WHICH THE FAA HAS IDENTIFIED AS A MAJOR THREAT, PURPORTEDLY JUSTIFYING A POLICY OF NO EXEMPTIONS TO THE AGE 60 RULE, ACTUALLY POSES NO THREAT TO SAFETY IN AIR CARRIER OPERATIONS, REGARDLESS OF PILOT AGE.

FAA officials have claimed that the age 60 rule is needed because pilot incapacitation would cause airline accidents. That claim is refuted by the historical record that begins even before the rule was first proposed to Administrator Quesada by his friend, C.R. Smith, the American Airlines

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[178] Homer L. Reighard, deposition, 64, in Attachment-7 to declaration of Elaine Bloomfield, *EEOC v. Lockheed Corp.* (U.S. Dist. Ct., Central Distr. Calif., for hearing Oct. 22, 1990).

[179] FACT SHEET, AVIATION SAFETY, *supra* note 172.

chairman. Undisputed data show that incapacitation, even death, has not caused accidents in multicrew aircraft of the types flown by commercial air carriers since the late 1960s and early 1970s when all the airlines adopted "fail-safe" procedures and equipment. Since these protective measures - prompted by thorough analysis of five aircraft accidents of the early 1960s that did involve pilot deaths - have been adopted, pilot deaths and incapacitations (not age-related, certainly not age-60-related) have continued to occur but have not caused a single accident. And the universal use of the two-communication rule, requiring systematic verbal interaction between the aircraft's two pilots, means that any incapacitation is discovered before it can endanger the flight. The introduction of a regulation requiring use of shoulder harnesses[180] prevents an incapacitated pilot from falling forward onto the instrument panel, so that the other pilot can immediately take full control of the aircraft.

An influential study by Captain Harry Orlady in 1966, before the fail-safe systems were put in place, reviewed the 16 cases of "death in the cockpit" that had occurred aboard scheduled U.S. air carrier flights in the prior 15 years.[181] All were due to heart attacks. "Of these 16, one was 28 years old, four were in their 30's, seven were in their 40's, and the 'old men' were 50, 52, 52, and 55," Orlady noted.[182] "Six of the deaths occurred during flight, nine immediately after landing, including two on the roll-out, and one occurred on the ramp as the pilot was boarding his airplane."[183] The

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[180] 14 C.F.R. § 25.312(e), § 25.785 (f), (g). However, FAA has not mandated manual lock shoulder harnesses as recommended by both the Harper-Kidera protocol and in the *Report of the President's Task Force on Aircraft Crew Complement* (Washington, Jul. 2, 1981)..

[181] Harry Orlady, *ALPA Views on Pilot Selection, Monitoring and the Criteria for Release from Duties Involving Flying*, Flight Safety Foundation International Air Safety Seminar, Madrid (Nov. 17, 1966).

[182] *Id.* at 1.

[183] *Id.* at 2.

only one of these that caused an aircraft accident was the heart attack of a 38-year-old Captain Karl Rader on a Flying Tiger Constellation at Burbank, Calif. in 1962. Reporting that investigation had found the newly-hired copilot was inadequately trained, had no verified large aircraft experience, and had falsified his flying experience before being hired, Orlady reported that this crash helped to focus attention on the fact that "the ultimate safety of flight in these cases depends primarily upon the capability of the remaining crew members to recognize the problem in time to take over the operation of the airplane."[184] Orlady, chairman of the Flight Safety Foundation's Aeronautical Coordinating Committee, called for a thorough reevaluation to come up with "processes or procedures which facilitate recognition of the problem, maximize the warning time available to the remaining flight crew, and develop operational procedures to best cope with it."[185] Orlady pointed out "the ease and rapidity with which the other pilot can take over the controls," and the need for "an effective and reliable restraint system" to keep a pilot from slumping over the controls.[186] When FAA announced the age 60 rule December 5, 1959, no U.S. air carrier accident had ever been caused by a pilot fatality.

A multinational study by L. E. Buley reported on 17 cases of "death of airline pilots while on 'active' duty during the period January 1961 through April 1968," resulting in five aircraft accidents.[187] (The last death/accident reported was

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[184] *Id.* at 3, 4.

[185] *Id.* at 5.

[186] *Id.* at 5-6.

[187] L.E. Buley, "Incidence, Causes and Results of Airline Pilot Incapacitation While on Duty," *Aerospace Medicine* (January 1969), 64. Although non-exhaustive and conservative in its reporting, the listings were derived from survey data from 17 International Air Transport Association (IATA) countries (as reported by Lane, 1971) - with U.S. ALPA and foreign IFALPA responses collated separately,

in August 1966, but the analysis covered data to 1968.) No correlation with age is apparent - certainly not "old age" - with one succumbing pilot having been in his 20s, three in their 30s, nine in their 40s, and only four in their 50s. Of the five resulting in accidents, no correlation with age is apparent, with one aged 38, one 44, two 45, and the fifth age 59. A more detailed analysis revealed that in four of the latter cases, it was not the pilot's death but rather systemic failures, later corrected, that ultimately led to the accidents. In two of the cases, the copilots were incompetent;[188] in the two other cases, lack of adequate restraint (shoulder harnesses) allowed the distressed pilots to slump over the controls, precluding the remaining pilot from effecting a recovery.[189]

Buley commented on efforts then under way to develop and implement "fail-safe" policies and procedures in the airline industry, an approach which "requires both the presence of additional competent staff in the standard, large aircraft, a multiple-pilot crew complement in air carrier operations "to take over the duties of any 'failed' member without an

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and a favorable comparison between them noted. In any event, the data is authoritative, in the public domain, cited repeatedly in the technical press, and never challenged, even by FAA.

[188] Lockheed 1049 freighter, N. Hollywood, Calif., Dec. 14, 1962. Lockheed 188 C, Ardmore, Okla., Apr. 22, 1966: In FLYING THE LINE: THE FIRST HALF CENTURY OF THE AIR LINE PILOTS ASSOCIATION (1982), at 258, the author, George Hopkins reported that, when the pilot died suddenly in the cockpit, "his copilot proved incapable of landing the aircraft safely. ALPA pointed out that any regulatory setup that would permit an airline to employ an incompetent copilot, particularly a company holding a Pentagon contract, showed, again, that there was more wrong with 'the system' than with the pilots."

[189] DC-4 freighter, Brisbane, Australia, May 24, 1961: Cardiac arrest on short final during a night visual approach. Pilot fell across the throttles attempting to leave his seat. CV-440, Oslo, Norway, Dec. 8, 1966: Pilot collapsed onto control yoke at 50 ft. altitude on approach in bad weather.

unacceptably high workload resulting, and the environment in which this may be done in a tight situation in an orderly fashion."[190] He also noted work going on to improve "pilot restraint" and other measures.[191] The study by Dr. Buley, Chief of Aviation Medicine for the International Civil Aviation Organization, helped focus worldwide attention on development of solutions that would prevent pilot incapacitation, whenever it occurs, from causing air carrier accidents.

Following the detailed analyses by Orlady and Buley, the United Air Lines Medical and Flight Training departments conducted extensive simulator tests for handling pilot incapacitation incidents in multiple-crew, airline-type flight operations for (1) obvious incapacitation and (2) subtle incapacitation. It was in these tests that the requirement for an effective shoulder harness and the two-communication rule were developed. A manual-lock shoulder harness (as opposed to the inertial-lock reel as found in automobiles) keeps a pilot suffering obvious incapacitation from slumping over the controls - but FAA has not mandated installation of these harnesses.[192] The two-communication rule enables timely detection of subtle incapacitation and transfer of flight duties where necessary.[193] The two

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[190] Buley, *supra* note 187 at 69.

[191] *Id.*

[192] 14 CFR 121.311(e).

[193] A later review of these data by Orlady revealed the minimal consequences of a timely recognition and transfer of control following an incapacitation event. In the UAL simulator exercises - for both obvious and subtle incapacitation - the shortest recognition and transfer of control time was two seconds and the longest seven seconds, with the mean at 3.5 seconds. At nominal descent rates for jet aircraft on an instrument approach (roughly 172 mph, 700-800 ft./min. descent) these transfer times correlate to between 23 and 93 feet total altitude lost during the event, with the mean at roughly 45 feet. Orlady (1973), 13.

departments working together developed policy, protocol and procedure for dealing with pilot incapacitation at any time during flight, even for the most critical moments during takeoffs and approaches to landing. Their findings were reported in *Aerospace Medicine* in 1969-71.[194] United's "two-communication" rule and pilot restraints added significantly to the model "fail-safe" system to prevent accidents due to pilot incapacitation. The program development was led by the airline's regional medical director, Dr. C.R. Harper, medical director, Dr. G.J. Kidera, and psychologist, Dr. J.F. Cullen in association with United's simulator training department. Their study fostered the creation of a classroom training program for flight crews, a training video on the "two-communication" rule,[195] and installation of highly effective shoulder harnesses. The "two-communication" training program developed by United was adopted by the airline industry universally. The installation and use of the manual-lock shoulder harnesses, though not required by FAA regulation, has similarly been adopted throughout the industry. The 34-minute video produced by United's training department demonstrated the operational procedures developed. The film, with accompanying training materials, was marketed by United Airlines throughout the aviation community in the early 1970s. Yet it is not clear why FAA still has declined to mandate by general safety regulation either in-flight incapacitation training or observance of the two-communication rule, either of which eliminates any rational argument that the age 60 rule could be justified by the

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[194] C.R. Harper, G.J. Kidera and J.F. Cullen, "Study of Simulated Airline Pilot Incapacitation; Phase I—Obvious and Maximal Loss of Function," *Aerospace Medicine* (Oct. 1970), 1139. C.R. Harper, G.J. Kidera and J.F. Cullen, "Study of Simulated Airline Pilot Incapacitation; Phase II—Subtle or Partial Loss of Function," *Aerospace Medicine* (Sept. 1971), 946-948.

[195] See Videotape Exhibit VT-1.

danger of an incapacitation accident in multiple-crew airline flight operations.

Two studies define the pilot incapacitation-induced accident risk in multiple-crew air carrier operations following the UAL-developed and distributed incapacitation protocol - Lane (1971)[196] and Chapman (1984).[197]

In reviewing Buley (1969) data as well as additional information made available at an IACO meeting in late 1970, Lane[198] made inferences about the population base and average flight stages per year in worldwide, multiple-crew, air carrier flight operations, to derive estimates of risk for both incidences of incapacitation and probability of accident resulting. To place these risks in a realistic perspective - something that previously had not been done - Lane noted that, in "the absence of a suitable safety yardstick...[pilot incapacitation events] can be regarded as alarmingly frequent or negligibly infrequent, depending on the viewpoint of the reader." To overcome this problem of undefined perspective, Lane turned to what he considered to be a suitable measure of safety "in the criteria underlying the aircraft design requirements" and equating the "flight crew" as a critical component, or subsystem in the total aircraft/flight environment. In that context, the author determined that the "actual incidence of disease-induced, incapacitating events" was one-third to one-twentieth that required by the British operational performance (failure)

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[196] J.C. Lane, *Risk of In-Flight Incapacitation of Airline Pilots*, AEROSPACE MEDICINE (DEC. 1971), 1319-1321.

[197] Peter J.C. Chapman, *The Consequences of In-Flight Incapacitation in Civil Aviation*, AVIATION, SPACE AND ENVIRONMENTAL MEDICINE (June 1984), 497-499.

[198] Lane (1971) at 1320. This included data from two separate IFALPA and IATA pilot surveys as well as ALPA loss of license (insurance) data from the U.S. ALPA membership.

criteria, including that for the most critical phases of flight – takeoffs and landings.

Just over a decade later, Chapman (1984) also referred to the generally accepted aircraft design criteria for critical functional/mechanical systems in air carrier operations,[199] quantified the risk of sudden incapacitation from all causes (277 reported) in multiple-crew flight operations from IATA data covering the years 1965-1981 and thirteen cardiovascular events from 1965 to 1977. Because too few accidents had occurred due to the failure of interest (cardiovascular) for a valid analysis, Chapman developed scenarios to be conducted during the course of normal recurrent simulator training for the aircrews of British Caledonian Airways, all involving the unexpected, subtle incapacitation of one pilot at a critical phase of flight.

Correlating the 13 reported actual cardiovascular events from 1965 to 1977 with the IATA population figures for the same era, Chapman computed a risk of cardiovascular failure at one in 20.8 *million* flight hours. Next, correlating the simulator exercise-derived "crash rate" with the 13 known cardiovascular events for the same calendar years, Chapman then derived a risk of accident resulting from cardiovascular failure in multiple-crew air carrier flight operations under the unrealistically "very worst possible" circumstances, at one in 8.3 *billion* flight hours – or, at the then existing level of worldwide flight activities – one in 400 years. And, like Lane more than a decade earlier, Chapman compared these risks with those of generally accepted airworthiness standards (both European JAR and U.S. FAA) for large air transport-type aircraft, finding:

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[199] Chapman (1984) at 499. EUROPEAN JOINT AIRWORTHINESS REQUIREMENTS, LARGE AIRPLANES (JAR 25), AND FAA AIRWORTHINESS STANDARDS, TRANSPORT CATEGORY AIRPLANES (PART 25).

> In airworthiness terms, the risk of catastrophe due to all causes of pilot incapacitation should lie between 1 in 100 million and 1 in 1000 million [flight] hours (10 /-8 to 10 /-9), and the risk due to cardiac incapacitation should not exceed 10 /-9. Two conclusions flow from this. The first is that the 'crash' rate now being achieved in commercial operations (10 /-10, see above) is at least 10 times better than is required by airworthiness criteria for comparably vital aircraft systems. The second, logically, suggests the possibility of changing existing attitudes toward medical assessment.[200]

These observations and conclusions have been verified and supported for multiple-crew air transport-type flight operations for decades and around the world. But the FAA, closing its eyes to fact and logic, steadfastly has refused to consider any of them in weighing alternatives to the age 60 rule.

A 1969 study coauthored by Federal Air Surgeon Siegel found that, even for general aviation pilots, "the older pilots do *not* experience a higher accident rate than their younger colleagues." This conclusion was supported by Siegel's observation that, for cardiovascular events, even in the single-pilot, general aviation environment where the pilot's incapacitation – at any stage of flight – is almost certain to be fatal,

> Without doubt, *were it not for the physical standards regarding repetitive medical certification for airmen,* the in-flight

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[200] *Id.* at 499. (Emphasis added.)

> incapacitation rate would be considerably higher.[201]

An earlier study by Siegel's coauthor had similarly concluded:

> An analysis of the accident record of older general aviation pilots (over 60) for 1965 reveals that this age group has an accident record essentially comparable, and in some cases superior, to that of the younger pilot group. Especially for the private pilot group, *the age and accidents were not significantly related.*[202]

The International Federation of Air Line Pilots Associations (IFALPA) administered a program of simulated pilot incapacitations to test the effectiveness of "fail-safe" procedures on which they already had been trained. These unannounced experiments were conducted aboard Irish Airlines commercial flights. In each surprise test, one of the pilots would close his eyes and stop functioning. The other pilot, unaware that the incapacitation was staged, had to keep the aircraft flying safely. Test results derived from both simulator exercises[203] and actual line operations demonstrated that pilot incapacitation at any stage of flight

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[201] P.V. Siegel, S.R. Mohler, *Medical Factors in U.S. General Aviation Accidents*, AEROSPACE MEDICINE 69-2 (January 1969), at 4. (Emphasis added.)

[202] Stanley R. Mohler *et al.*, *Aircraft Accidents by Older Persons*, AEROSPACE MEDICINE 67-22 (October 1967), at 4. (Emphasis added.)

[203] Harry Orlady, *Controlling the Air Safety Risk in Pilot Incapacitation*, presented at the Lloyd E. Buley Memorial Session, 8th Annual Symposium on Civil Aviation Medicine, Guadalajara, Mexico (Oct. 23, 1973), at 5.

in multiple-crew air carrier flight operations did not compromise safety.[204]

A 1978 memorandum report produced by the FAA's Protection and Survival Laboratory (CAMI) covering the years 1971-75 - subsequent to the Orlady and Buley analyses and the development of the UAL Harper and Kidera incapacitation protocols including the two-communication rule - identified 18 instances of in-flight pilot incapacitation in multiple-crew air carrier flight operations (including the death of one captain). None of these caused any accident or aircraft incident.[205]

In 1980 the FAA certificated the DC-9-80 aircraft to operate with a minimum crew of only two pilots (not requiring any third pilot or flight engineer). The Federal Air Regulations require consideration of crew workload and pilot incapacitation in two-pilot aircraft during the certification process.[206] A task force appointed by President Reagan in 1981 confirmed that the new DC-9-80 jetliner did not need a third pilot.[207] The task force report noted, "The 'two-communication' rule is an effective safeguard against subtle pilot incapacitation." The report also took note of the

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[204] Report on IFALPA Study of Fail-Safety in BAC 1-11 Crew Complement, Industrial and PEL-MED Study Group Meeting, Dublin (Dec. 5-7, 1966).

[205] D. Pollard, *Survey of Air Carrier In-Flight Illnesses, 1971-1975*, Protection and Survival Laboratory, Civil Aeromedical Institute, FAA Memorandum Report No. AAC-119-78-10(S) (Jul. 28, 1978).

[206] FAR Part 25 Appendix D: "(b) Workload factors. The following workload factors are considered significant when analyzing and demonstrating workload for minimum flight crew determination: ....

"(10) Incapacitation of flight crewmember whenever the applicable operating rule requires a minimum flight crew of at least two pilots."

[207] *Report of the President's Task Force on Aircraft Crew Complement* (Washington, Jul. 2, 1981), 14.

presence of inertial reel (not manual lock) shoulder harnesses. The presidential task force recommended that incapacitation training and procedures (such as developed by Harper and Kidera a decade earlier) be required of all airlines. It also recommended that further study be directed to the design of crew restraint devices that prevent interference with control column movement in case of acute pilot incapacitation.[208] The FAA apparently has not followed either of these recommendations.

A 1992 University of Pennsylvania study of firefighters concluded, regarding public-safety occupations where there is multiple-crewmember backup support: "The risk of experiencing a catastrophic medical event that would compromise public safety is so small as to eliminate the factor in the debate regarding age-based retirement."[209]

The FAA even endorses this concept. In Amendment 67-4, FAA relaxed the requirement for the special issuance of medical certificates for air traffic tower operators *because*, it declared, there was a qualified back-up operator available. Explaining the change, FAA said:

> In general, the air traffic controller is under the close supervision with back-up personnel close at hand, capable of performing his functions in the event he is physically disabled. .... With these considerations in mind, and with the initiation of the new medical program...it is now possible for the Agency to establish a system for issuing waivers, under these controlled conditions,

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[208] *Id.*, at 55.

[209] Landy *et al.*, Center for Applied Behavioral Sciences, University of Pennsylvania, *Alternatives to Chronological Age in Determining Standards of Suitability for Public Safety Jobs* (1992).

> for certain physical defects in ground airmen.[210]

Moreover, the FAA made this change in the "system for issuing waivers, under those controlled conditions" (*i.e.*, with qualified and capable back-up personnel close at hand) without public notice and solicitation of comment.

> Since this amendment is procedural in nature and results in providing all certificated air traffic control tower operators an additional benefit (*i.e.*, relaxed eligibility criteria for waivers), notice and public procedure

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[210] Amendment 67-4, Special Issue of Medical Certificates for Air Traffic Control Tower Operators, 31 Fed. Reg. 5190 (Mar. 31, 1966).

A full reading of the Amendment, however, reveals a rather duplicitous mindset within the agency on the issue of back-up support. The Amendment said:

"Air traffic controllers must hold a second class medical certificate, the same as required of commercial pilots.... Obviously there are great differences in the ground and flight environments in which these different airmen function.... Even in multi-engine aircraft, where crewmembers perform more specialized duties, the sudden physical incapacity of one of them can affect the overall crew operation to the extent that aircraft safety is seriously endangered."

Omitted from this is the fact that, unlike the air traffic controller's position, there is established by regulation a 100 percent back-up for every pilot in every Part 121 aircraft subject to the age 60 rule (14 CFR 25.1523). This back-up pilot is not merely capable of performing the specialized piloting functions, but is a fully qualified pilot in the particular aircraft model and type, and is there as an alter-ego, specifically trained and dedicated for "fail safe" purposes, to perform his duties should the other pilot become incapacitated. Moreover, the multiple-crew aircraft flown in these airline operations is itself specifically designed to facilitate its being flown by the back-up pilot if one pilot becomes incapacitated. The FAA's assertion about "affecting overall crew operation to the extent that aircraft safety is seriously endangered" is inconsistent with FAA imposed aircraft design criteria (Appendix D of Part 25, paragraph (b)(10)), and disproved by more than 30 years of industry experience both nationally and worldwide.

> thereon are not required and this amendment may be made effective in less than 30 days after publication.[211]

There is conclusive proof that pilot incapacitation does not cause airline accidents in multiple-crew (*i.e.*, qualified back-up pilot "close at hand") air carrier flight operations. The proof is the factual record, which the agency has refused to acknowledge for decades. The fact of the matter is that – even though pilots have on rare occasions died on the job – not a single air carrier accident has been reported in the literature as caused by pilot incapacitation since the "two-communication" rule and manual-lock shoulder harnesses were widely adopted industry wide in the early 1970s (though not mandated by the FAA). A review of National Transportation Safety Board reports for the years 1970-1989 revealed that no air carrier accidents were attributed to pilot incapacitation (but several were due to pilot inexperience, among them the Air Florida crash at National Airport and Continental at Denver).[212] In other words, it was

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[211] *Ibid.*

[212] Gerard M. Bruggink, *U.S. Aviation Accidents and Deregulation*, Air Line Pilot, 20 (March 1991), adapted from *Flight Safety Digest*, (January 1991). Bruggink notes (p. 22) that the Denver crash was the first in NTSB history where the Board had found a low experience level by both crewmembers as a contributing factor, and had recommended corrective action on the crew pairing issue.

In a hearing before the Senate Subcommittee on Aviation in 1989, FAA admitted, when asked for its response to the NTSB recommendations on pairing inexperienced crews – with specific reference to the Denver accident – FAA's only action had been to *recommend* minimum pairing levels at 100 hours in type. *Pilot Supply and Training*, S. Hrg. 101-307, 101st Cong., 1st Sess. (Aug. 3, 1989), at 13. In air carrier operations, 100 hours experience is but a "drop in the bucket," thus even the FAA's recommendation is meaningless.

In a recent news release (FTRAN-NR, FAA 23-95 dtd. April 25, 1995) FAA misleadingly asserts that it increases "minimum combined experience levels for two pilots flying together." Not true. The new rule merely restricts novice co-pilots from crediting as flight experience observational (jump-seat) time. And requires that the

documented in a scholarly study that no air carrier crash could be blamed on incapacitation since the airlines adopted "fail-safe" systems more than 30 years ago. It is still the undeniable truth today. FAA's claim, asserted for more than 40 years, that the age 60 rule is justified to prevent pilot incapacitation from causing accidents is irrational; the FAA position flies in the face of the fact that there is no causal relationship between pilot incapacitation and airline accidents in the fail-safe, multiple-crew, large-aircraft airline industry - and has not been for well over 30 years.

(II) (E) - - FAA, WHEN DECIDING WHETHER TO GRANT EXEMPTIONS TO THE AGE 60 RULE, HAS FAILED TO CONSIDER THE FACT THAT FAA CONTROLS (PERFORMANCE AND MEDICAL CHECKS) ELIMINATE THE 'FAILING' PILOT BEFORE THE SYSTEM IS PLACED AT RISK.

When a pilot of any age becomes incapacitated for any reason in a multicrew commercial air carrier jet and the other pilot takes over, the "fail-safe" system put in place decades ago in such aircraft precludes accident resulting from the incapacitation.[213] During congressional testimony in 1979, the FAA's Deputy Administrator admitted both the existence and effectiveness of the "fail-safe" system of multiple or back-up pilots in airline operations:

> [CONGRESSMAN] BIAGGI: Last question for [FAA Deputy Administrator] Taylor. You heard testimony of the preceding witness who said that in the event of the demise or incapacitation of a pilot. .. How would you comment on that observation?

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captain make all takeoffs and landings if the co-pilot has less than 100 hours actual operating time in that aircraft type.

[213] See notes 180-214 and related text.

> MR. TAYLOR: Let me see whether I understand your question.
>
> [CONGRESSMAN] BIAGGI: *In other words, the pilot has a heart attack. The rest of the crew automatically takes over with no problem; is that factual or would you like to elaborate on that?*
>
> MR. TAYLOR: *There is no doubt in my mind that that is factual. That is true.*[214]

Actually, the need to have the backup pilot take command because of incapacitation is rather rare because standard FAA controls (regular performance and medical checks) eliminate pilots regardless of age if they have an increased risk of becoming incapacitated. Even in the realm of general aviation, this systematic protection was acknowledged in a 1969 study coauthored by Federal Air Surgeon Siegel:

> Pilot inflight incapacitation due to experiencing a coronary occlusion or a cerebrovascular accident occurs about six times each year [among private pilots] as documented by the reporter of the [NTSB].... *Without doubt, were it not for the physical standards regarding repetitive medical certifications for airmen* (Class III medical examination at two-year intervals], *the inflight incapacitation and accident rate would be considerably higher.*[215]

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[214] AGE DISCRIMINATION AGAINST AIRLINE PILOTS, 1979: HEARINGS BEFORE SELECT COMMITTEE ON AGING, U.S. House, 96th Cong., 1st Sess., Comm. Pub. No. 96-183 (1979), at 53.

[215] P.V. Siegel, S.R. Mohler, *Medical Factors in U.S. General Aviation Accidents,* AEROSPACE MEDICINE 69-2 (Jan. 1969), at 4. (Emphasis added.)

Nor has the agency ever denied its ability to diagnose illness and/or defects in older individuals. Indeed, during congressional testimony in 1979, Federal Air Surgeon Reighard, when questioned directly, admitted that, in FAA's view, medical diagnostics were the same regardless of age:

> [CONGRESSMAN] PEPPER: .... Is it any more impossible to detect a physical incapacity or inability in older people than in younger people?
>
> DR. REIGHARD: No, *the precision in medicine is the same regardless of age.*[216]

In the commercial airline industry - where the medical Class I as opposed to Class III certification standards are both more demanding and, at six-month intervals, four times more frequent - an even more rigorous systematic screening out of medically unfit pilots has been acknowledged repeatedly in the FAA's own CAMI literature. A series of these studies provided annual assessments of aviator medical qualifications from 1971 through at least 1988. As noted for 1971:

> Observations of the airline pilot group probably come closest to a true reflection of disqualifying disease as is possible to observe. Prescreening by airline companies before employment and FAA requirements for issuance of a first-class medical certificate result in this group being essentially purged of disease prevalence that contributes to higher rates for other non-pilot groups.[217]

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[216] AGE DISCRIMINATION AGAINST AIRLINE PILOTS, *supra* note xx at 51. (Emphasis added.)

[217] Charles F. Booze, CHARACTERISTICS OF MEDICALLY DISQUALIFIED AIRMAN APPLICANTS DURING CALENDAR YEAR 1971, FAA-AM-74-5 (May 1974), at 4.

The "purging" effect of the FAA's system of medical certification was independently confirmed for air carrier pilots in a 1976 study at the Mayo Clinic. The study estimated that, based on career terminations for all causes, less than half of the entering pilots at one major carrier (TWA) would reach the normal retirement age of 60. And of all the premature departures in one group studied, 30 percent were medically retired.[218]

In 1978 a report by the House Committee on Government Operations said in part:

> 2. The current level of safety in scheduled passenger air carrier transportation is remarkably high; it is three times better than the safety record of commuter airlines.
>
> 3. Proponents of regulatory reform have frequently argued that direct FAA regulation is primarily responsible for the high level of safety. However, *since the FAA relies extensively on the air carrier industry in both standard setting and monitoring, industry self regulation is just as much responsible for the level of safety, if not more so.*[219]

In 1990, sixteen years after Booze' initial observations on medical disqualifications for airline pilots, FAA/CAMI researchers again expressed identical views on the extraordinary fitness of airline pilots - as they had done repeatedly during the intervening years - and in virtually identical language:

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[218] O.R. Orford and E.T. Carter, *Preemployment and Periodic Physical Examination of Airline Pilots at the Mayo Clinic, 1939-1974*, AVIAT., SPACE & ENVIRON. MED. (Feb. 1976), 47(2): 180-184, at 183.

[219] AIRLINE DEREGULATION AND AVIATION SAFETY, H. Rep. No. 95-930, 95th Cong., 2d Sess. (Mar. 8, 1978), at 31. (Emphasis added.)

> Observations of the airline pilot group probably come closest to a true reflection of disqualifying disease as is possible to observe. *Prescreening by airline companies before employment and FAA requirements for issuance of a first-class medical certificate* result in this group being essentially purged of disease prevalence that contributes to higher rates for other non-pilot groups.[220]

In the same paper, the authors also observed that the annual age-specific denial rate for active airline pilots rose, at an essentially exponential rate, from one denial/year per 1,000 active airline pilots ages 35-39 to 16.2 denials/year per 1,000 active pilots ages 55-59.[221]

The report of the National Institute on Aging observed in 1981 that the "very high level of safety" in commercial air carrier operations appeared to result from, *inter alia*, "a complex system of performance evaluation by air carriers and the Federal Aviation Administration," and "government and air carrier medical surveillance."[222]

In 1993, the author of the FAA's major statistical analysis of age vs. risk of accident concluded:

> Our analysis provided no support for the hypothesis that the pilots of scheduled air carriers had increased accident rates as they neared the age of 60.... [T]he data for all the various groups of pilots were remarkably consistent in showing a modest decrease in

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[220] L.E. Downey and S. J. Dark, *Medically Disqualified Pilots in Calendar Years 1987 and 1988*, DOT/FAA/AM-90/5 (June 1990), at 2.

[221] *Id.* at 3.

[222] NIA Panel, *supra* note 86 at 2.

> accident rate with age.... *It was as easy to conclude that the FAA's system improved the composition of the groups over time as it was to conclude that pilots' performance improved with age.*[223]

In 1954, the Aero Medical Association's Committee on Pilot Ageing recommended using simulators to evaluate the older pilot.[224] In 1961, the Lovelace Foundation suggested that the agency "begin a program to perfect a quantitative method of evaluating flight simulator performance in highly skilled pilots to serve as a psycho-physiological instrument for validating the significance of a pure medical index."[225] In the 1970s, the FAA Gerathewohl studies[226] -- cited to the GAO in 1989 as a "major study"[227] - validated the use of electronically recorded aircraft movement as an "objective measure" of pilot performance.[228] In the 1980s and 1990s, FAA adopted LOFT (Line Oriented Flight Training, specifically endorsed by the President's Task Force on Crew Complement) and AQP (Advanced Qualification Program) as enhancements to the periodic training and checking of flight crew ability. And in 1980, FAA adopted the most

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[223] Kay, *supra* note 115 at 6-2.

[224] Aero medical Association, Report of the Committee on Pilot Ageing and Allied Problems, Presented at the 25th Annual meeting of the Aero medical Association, Washington, D.C., 3. March 30, 1954.

[225] Robert Proper, *Research Planning Study of Aging Criteria, Final Report*, The Lovelace Foundation for Medical Education and Research, FAA Project No. FA-904, 40. July 31, 1961.

[226] Gerathewohl, S.J., *Psychophysiological Effects of Aging: Developing a Functional Age Index for Pilots: III. Measurement of Pilot Performance*, FAA Office of Aviation Medicine, Am-78-27, August 1978

[227] GAO Fact Sheet, AVIATION SAFETY, INFORMATION ON FAA'S AGE 60 RULE FOR PILOTS, GAO/RCED-90-45FS, 17. November 1989

[228] Gerathewohl, S.J., *Psychophysiological Effects of Aging: Developing a Functional Age Index for Pilots: III. Measurement of Pilot Performance*, 30-34.

ambitious of its simulator programs - Advanced Simulation.[229]

With Advanced Simulation, the FAA considers the modern, full motion, CGI visual "advanced simulator" so realistic in its replication of actual aircraft flight characteristics that it allows the transitioning airline pilot of any age or experience level to make his or her first flight in the real aircraft on a regularly scheduled flight with paying passengers on board![230] Indeed, for all levels of pilot performance evaluations, the FAA considers the simulator environment more demanding and revealing of ability - and failure - than the real aircraft.

> If the trainee makes a tragic mistake in a simulator, the simulator will dramatically simulate a crash and there is no doubt as to who made the mistake. The pilot's self-esteem, peer pressure, and the pressure of being observed by one's employer and possibly the FAA can exceed the psychological pressure of flying the airplane.[231]

In 1991, Karen Baker, assistant general counsel of the EEOC, with six years experience prosecuting age discrimination cases in aviation-related public safety occupations, including acting as lead counsel in suits against the Boeing Co. and Lockheed Aircraft Corp. involving the age 60 rule,

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[229] Notice of Proposed Rulemaking: Plan to Permit Additional Flightcrew Training in Advanced Flight Training Simulators, 44 Fed. Reg. 65550 *et seq.* (Nov. 13, 1979). Final Rule: Advanced Simulation, 45 Fed. Reg. 44176 *et seq.* (June 30, 1980).

[230] "At the completion of the final simulator check, the applicant will receive the appropriate certificate or rating." 45 Fed. Reg. 44177.

[231] 45 Fed. Reg. 44182.

criticized the FAA's claim that it could not assess cognition in pilots over 60 because they suffered no detectable pathology. From her experience in this area of litigation, Ms. Baker was well qualified to observe:

> [I]t is unlikely that [active] professional pilots . . . would demonstrate significant cognitive decline as they age. There are four reasons for this. First, to become a pilot, one needs a fairly high level of mental function to begin with. *Persons with impaired cognition do not become pilots.* . . .
>
> Second, persons with congenital problems of the type that negatively implicate cognition, including hypertension, diabetes, coronary artery disease, and alcoholism, either *do not become or do not remain pilots.* . . .
>
> Third, pilots are rigorously and continually tested as to their aviation knowledge and "stick and rudder" skills. A pilot who cannot remember a checklist, becomes confused as to landing instructions from ATC, of flies outside tolerances will be detected, and if the condition persists, will have his license pulled. *Thus, the system itself eliminates individuals who may well have otherwise undetected cognitive problems.*
>
> The fourth reason why loss of cognitive power is not expected in pilots is that they use their mental muscle. Each pilot during his career has had to learn and use rapidly changing technologies, adapt to different airplanes, cope with increasing complexity in

> air traffic control, interact with innumerable personalities. *The job by its definition is a constant learning process, and pilots who do not learn do not continue flying.*[232]

In a further criticism of the FAA's claim that it cannot prospectively assess the older pilot's faculties absent detectable pathology, Baker noted that Castelo-Branco, in his study of retired TAP-Air Portugal pilots, had found that among the older (retired) pilots no longer medically qualified, all suffered from conditions diagnosed before their 60th birthday.[233]

Evidence of the effectiveness of screening out pilots who are not up to par was noted in reports by Siegel, Booze, Lane, Chapman, Harper-Kidera, the House Government Operations Committee, Hilton Systems, and the EEOC, among others. FAA regulations require the regular use of high definition, virtual reality simulators, as well as in-flight observation and other monitoring at all times by company dispatchers, a myriad of FAA's own agents, and fellow crew, to determine whether a pilot remains fit and able and his or her performance remains within acceptable parameters. And the FAA itself has conceded – at least to the Congress when asked point-blank – that these techniques work just as well regardless of the age of the pilot.

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[232] Karen H. Baker, *Neuropsychological Testing of Pilots*, 6. Presented to the Flight Safety Foundation, 36th CASS, White Plains, NY (1991). (Emphasis added.)

[233] *Ibid.*

(II) (F) -- FAA LACKS CREDIBILITY AS A SOURCE OF INFORMATION REGARDING THE TRUE PURPOSE AND EFFECTS OF THE AGE 60 RULE AND ITS POLICY OF NO EXEMPTIONS.

FAA Officials Privately Concede That the Basis for the Rule Is Economics and Scheduling Convenience

The complete lack of credibility of FAA's public assertions that the age rule was based on medical or safety reasons is proven by FAA officials' private statements, now exposed, that the rule was really based on perceived economic factors - and industry management's convenience. The secret true purpose for retaining the mandatory retirement rule has been revealed by former FAA officials themselves and others who were witnesses to FAA officials' private statements, and by an FAA official's private correspondence.

Dr. Frank Austin, while serving as the Federal Air Surgeon, wrote that the real basis for the age 60 rule was economic, not medical. Austin said so in response to a letter he received in November 1984 from a former FAA official, Dr. Stanley R. Mohler, who had served as Chief of the agency's Aeromedical Applications Division.[234] Regarding Mohler's statement, "There is *no medical basis for the age 60 rule*," Austin wrote: "True in 1984!" Regarding the redundant statement, "Today there is *no medical basis for the rule*,"

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[234] Stanley R. Mohler, Director of Aerospace Medicine at Wright State University, in a Nov. 19, 1984 letter addressed to Frank H. Austin, Jr. at his Vienna, Va. home, wrote: "Enclosed are two items that consolidate some of my thinking on certain questions." One of the enclosures, titled, "NO MEDICAL BASIS FOR THE AGE 60 RULE," is of relevance to the present petition. (The other had to do with whether the Office of Aviation Medicine should report directly to the Administrator.) Austin wrote comments (which he signed, dated Nov. 24, 1984, and returned to Mohler) on the letter and the pertinent attachment. (See Exhibit CC.)

Austin again wrote: "*True.*" Regarding the statement, "If the operations people want to continue to fight for the rule, let them make their own case, as there is no longer a medical basis for it," Austin wrote: "True." There, at the bottom of the page, the FAA's top medical official added: "I believe this & Adm. Engan [the FAA Administrator] believes this. He wants to keep the age 60 rule now. I will support the Admiral in his position. When it can be done - age 60 will be eliminated (I think!) Its [*sic*] an ECONOMIC issue! Frank."[235]

Dr. Jefferson Koonce has recalled taking part in a March 13, 1986 closed meeting in which FAA officials emphatically stated that the rule was needed simply because of economic interests of the airline industry (which had nothing to do with medical or safety factors of any kind).[236] The meeting, Koonce later wrote, was arranged at the request of U.S. Rep. Edward R. Roybal, Chairman of the House Select Committee on Aging. FAA officials taking part in the secret meeting included Federal Air Surgeon Frank Austin, Deputy Federal Air Surgeon Jon Jordan and, according to Koonce' recollection, Anthony Broderick. The list of attendees also included Dr. T. Franklin Williams, Director of the National Institute on Aging. It was a memorable gathering, as Koonce reported:

> At the outset, after the passing of introductory pleasantries, one of the FAA persons flatly stated that we might discuss many things but *regardless* of what shall

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[235] *Id.* (Italics added; underscoring in original.)

[236] Jefferson M. Koonce, Ph.D., Professor and Acting Head, Aviation Research Laboratory, Professor of Mechanical and Industrial Engineering, University of Illinois, Champaign, letter to Samuel D. Woolsey, November 14, 1991 (Exhibit DD). Also see Austin declaration in *EEOC v. Lockheed*, U.S. Dist. Ct., Central Dist. Calif., Oct. 22, 1990 (Exhibit EE).

> transpire they, the FAA, are not going to agree to change its position about this issue (the Age 60 Rule). .... The FAA's statement was a shocking start, and it was no joke!
>
> In the subsequent discussions it was mentioned, by a FAA person, that the removal of the 'Rule' would be quite disruptive to the airlines because the airlines are all set-up for the retirement of pilots at 60 years. This would result in *economic* problems, manpower concerns, and all sorts of planning havoc. They, FAA and industry, felt that having all of the pilots continue after age 60 would be a great *economic* problem, and 'When would they retire?'[237]

Dr. Mohler also recalled attending the meeting in Congressman Roybal's office in which the top FAA officials made plain that the age 60 rule had no medical basis but would be enforced simply because they did not want to "burden" the airlines.[238] He recalled that the participants in the closed Capitol Hill meeting included FAA Administrator Donald Engen, Federal Air Surgeon Austin, Deputy Federal Air Surgeon Jordan, Dr. Koonce and NIA Director Williams. Mohler wrote:

> Mr. Roybal called the meeting for the purpose of getting a status on how the Age 60 Rule could either have individual exceptions made to it (as the FAA does for myocardial infarction, alcoholism, and other

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[237] *Id.* (Emphasis added.)

[238] Stanley R. Mohler, letter to Samuel D. Woolsey (Nov. 8, 1991). See Exhibit FF.

> disqualifying conditions), or be eliminated entirely.
>
> The high spots of the discussions included the statement by the FAA attendees that there is *no longer a medical basis* for the regulation, but that the FAA is reluctant to make exceptions or delete the regulation because FAA personnel *do not want to burden the airlines administratively* with a new personnel task of integrating the over 60 years of age pilots.[239]

FAA Administrator Quesada originally created the age 60 rule as an act of personal favoritism to reverse the results of labor-management arbitration decisions.[240] The disclosure of the Austin-Mohler correspondence and the secret Capitol Hill discussions expose the fact that the FAA has continued to enforce the age rule just so the airline companies would not be burdened with any administrative costs that may be associated with having to change retirement policies. These revelations of private correspondence prove that FAA's many public assertions about medical or safety reasons for the age 60 rule are completely devoid of credibility.

False and Misleading Data Disseminated on Purpose

The FAA also consistently has refused to allow collection of meaningful data that would disprove or tend to disprove the false claim that there is a medical justification for the age 60 rule.[241] The FAA Safety Analysis Division official who provided technical support for Golaszewski's Flight Time Study, and evaluated it upon completion, recognized that it

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[239] *Id.* (Emphasis added.)

[240] See notes 21-28 *supra* and related text.

[241] See notes 65-179 and related text.

was flawed and declined to accept the study or have FAA publish it.[242]

FAA has refused to acknowledge the valid recalculation of the Flight Time Study data without its distortions, performed first by Dr. David Drachman, and repeatedly by other investigators since. He found that the pilots age 60 and over have lower accident rates, not higher. Drachman, chairman of the neurology department at the University of Massachusetts Medical School, was a teaching fellow at Harvard, Phi Beta Kappa at Columbia, visiting professor at Georgetown and Johns Hopkins, officer of numerous panels, author or co-author of some 300 professional publications, papers and studies, served on the editorial board of five scientific publications and as technical reviewer for five additional scientific publications. "I have performed these analyses, and they do not support a conclusion that pilots age 60 to 69 experience a higher accident rate than their younger cohorts, but support the reverse conclusion instead."[243]

The Golaszewski Flight Time Study's demographic flaws – and their misleading effects – are common knowledge in the scientific community.

Explaining the demographic flaws in the Golaszewski's 1983 paper, Dr. Andreas E. Stuck observed:

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[242] See note 81 and related text.

[243] David A. Drachman, M.D., declaration, in *EEOC v. Lockheed*, U.S. Distr. Ct., Central Distr. Of Calif., Oct. 22, 1990, p. 7. For comparison: According to a statement of professional qualifications submitted to the FAA in about 1990, Golaszewski, on the other hand, claimed 10 years experience (in 1990) in consulting, a B.S. in Accounting (LaSalle College) and an M.P.A. in Public Sector Management and Finance (Wharton School, Univ. of Pennsylvania). Thus, in 1982-83, when he authored his "study," Golaszewski apparently was a recent graduate.

> Only one study covering the period 1976 to 1980 [Golaszewski (1983)] compared aircraft accident rates of over-60-year-old pilots with those of younger pilots. .... The accident rate of 60 to 69 year-old-pilots with a Class I medical certificate...was found to be two times higher than that of 50 to 59-year-old pilots. [*Note: This same false finding appeared in Broach's Report 4* (*supra* note 145) *and was presented to AsMA members.*] The comparison is, however, problematic. While the accident rate for 60-69 year old pilots was calculated by the number of accidents in general aviation divided by the number of pilot hours flown in general and small commercial aviation aircraft, the accident rate for 50-59-year-old pilots was calculated differently. In this latter case, in addition to hours flown in general aviation and small commercial aircraft, *pilot hours flown in large commercial aircraft were also included in the calculation of the accident rate. This results in an underestimation of the accident rate in 50-59-year-old pilots.*[244]

In 1992, Diane Hyland and others analyzed the 1983 Golaszewski study extensively - and critically. Their main criticism, replicating those of Drachman and Stuck, was:

> The rarity of accidents involving [medical] Class I pilots strongly suggests that the distribution of such accidents across the various categories will be different.... The

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[244] Andreas E. Stuck *et al., Multidimensional Risk Assessment versus Age as a Criterion for Retirement of Airline Pilots,* JOURNAL OF THE AMERICAN GERONTOLOGICAL SOCIETY, 40:526-532, at 527 (1992). (Emphasis added.)

> Part 121 pilots accumulate a substantial number of flight hours but contribute (proportionately) very few accidents. That is, they contribute substantially to the denominator of the ratio for the accident rate but hardly at all to the numerator. It is likely that this contribution changes as a function of age, so that the apparent effects of age in the Golaszewski data may be an artifact of the way accident rates are computed, i.e., they may reflect differences in flight hours accumulated by Class I pilots rather than differences in the likelihood of accidents.[245]

Edwin Kay, professor of computer science and statistics at Lehigh University, similarly criticized the Golaszewski study:

> Combining pilot classes, as done in the Golaszewski analysis, was inappropriate because it produced misleading accident rates. For example, pilots holding Class I medical certificates had relatively fewer accidents and higher flight hours. The accident rate profile for a heterogeneous group was influenced by the proportion of Class I pilots in that group.[246]

Although rejected and publication-refused by the FAA itself upon receipt in 1983, nevertheless the FAA provided the Golaszewski data to Charles Billings, a researcher at NASA-Ames – not for NASA work, but for his use as a private

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[245] Diane T. Hyland *et al., Airline Pilot Performance: A Review of the Scientific Literature,* Hilton Systems Technical Report 8025-1A, FAA/CAMI Contract No. DTFA-02-90-90125, 33. (Feb. 199.2)

[246] Kay, *supra* note 115 at 2-2.

consultant to several aircraft manufacturers then being sued by EEOC over their mandatory retirement policies.[247] Through Billings, this data then appeared and was incorrectly identified as a NASA-Ames work product in a memorandum prepared by staffers in the Congressional Office of Technology Assessment.[248] In assessing this presentation of the Golaszewski data, T. Franklin Williams, Director of the National Institute on Aging, declared:

> One third of all reported flight hours for the years underlying the [Golaszewski, a.k.a. Billings, a.k.a. OTA] data were flown in air carrier operations.... No individual over 60 pilots airline flights, and the accident rates for pilots aged 60-69 who hold Class I and II medical certificates (like those also held by airline pilots) appears to increase in the [Golaszewski/Billings/OTA] analyses. However, that apparent increase is a function of the absence of pilots, after age 60, from air carrier operations, the safest type of flying hours.[249]

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[247] Charles E. Billings, NASA memorandum to Laurance Milov, FOIA officer (Sept. 3, 1991).

[248] Karen H. Baker, Assistant General Counsel, EEOC, in a declaration in *EEOC v. Delta Air Lines*, CV No. 89-0517-AWT (JRx), U.S. Dist. Ct., Central Dist. Calif. (Nov. 26, 1990), said that the OTA staff members who prepared the memorandum believed the Golaszewski data to be a NASA work product when they received it from Billings. Baker declaration, p. 4. Both NASA and NASA-Ames have denied responsibility for the Golaszewski data that incorrectly appears in the OTA memorandum as a NASA work product. Laurance A. Milov, FOIA Officer, NASA Ames Research Center, letter to Samuel D. Woolsey (Sept. 30, 1991). John E. O'Brien, Asst. Deputy Administrator, NASA, letter to Samuel D. Woolsey (Nov. 7, 1991).

[249] T. Franklin Williams, *supra* note 97 at 13.

When investigative journalist Stone Phillips and U.S. Rep. Jim Lightfoot (R-Iowa), on ABC News *20/20*, exposed the false and intentionally misleading presentation of data in the Flight Time Study, Golaszewski himself and FAA Associate Administrator Anthony Broderick appeared on the program. Golaszewski and Broderick failed to refute the debunking of the study's finding.[250]

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[250]The distortion of data in the Flight Time Study was so severe that it led to the false finding that pilots over age 59 had much higher accident rates than pilots under 60, when undistorted data would have shown that these older, more experienced pilots have lower accident rates. Golaszewski, confronted with this fact on the ABC News program 20/20, still would not admit it. Instead, Golaszewski claimed older pilots "probably" really do have accident rates "a bit higher" than younger pilots. Although his study has been used by FAA to defend the age 60 rule imposed on airline pilots, Golaszewski said his purpose in conducting the study was not to evaluate performance of airline pilots. Interviewed on the same program, FAA Associate Administrator Anthony Broderick likewise refused to admit it, and made the preposterous suggestion that the Golaszewski study was "the best scientific evidence." Stone Phillips of ABC News interviewed U.S. Rep. Jim Lightfoot (R-Iowa), FAA Associate Administrator Anthony Broderick, and Richard Golaszewski on the 20/20 program, February 9, 1990. Here is a portion of the written transcript in which Golaszewski failed to refute how misleading his study was (see the entire 20/20 segment on the age 60 rule in Video Exhibit VT-2)::

> PHILLIPS: [*voice-over*] *The* data the FAA points to time and time again to defend the Age 60 Rule comes primarily from this seven-year-old study. The study found that pilots in their 40's and 50's have a much lower accident rate than pilots in their 60's. The problem with the study is that it had nothing to do with airline pilots. It focused on private pilots flying much smaller planes with a lot less training and critics say comparing the two is outrageous.
>
> Rep. JIM LIGHTFOOT, (R) Iowa: That's not even apples and oranges. That's apples and billy goats. I mean, they're just totally unrelated.
>
> PHILLIPS: *[voice-over]* Congressman Jim Lightfoot is a private pilot and flight instructor himself.
>
> Rep. LIGHTFOOT: It'd be like comparing a professional truck driver to, you know, my aunt that drives two miles to work. There's no comparison.

Mr. BRODERICK: What we're looking for is not to have an exact comparison and an exact predictor. What we're looking for is the best scientific evidence that tells us whether or not it is reasonable to expect that pilots who are over age 60 have a higher accident tendency than those under age 60.

PHILLIPS: But the accident rate study the FAA points to as the best scientific evidence was, in fact, never published and never intended to address the Age 60 issue. And critics say it's not only irrelevant, it's incorrect because statistically the study was stacked against the older pilots to begin with.

Here's why. When the accident rates for pilots under 60 were figured, the statistician [sic] included more than 95 million hours of flying by commercial airline pilots without including a single airline accident. He left those accidents out, ignored them completely, so naturally, the younger pilots appeared to be flying more with fewer accidents than pilots in their 60's. The older pilots had no airline flying hours to count because the Age 60 Rule won't allow it.

[*voice-over*] We asked the author of the study [Richard Golaszewski] what would happen if all those additional airline hours were not included.

RICHARD GOLASZEWSKI, Author of Study: What you'd find is that the age-based difference in accident rates going from 50 to 60 would be less pronounced. And I have to grant you that. However, they'd probably still be a bit higher.

PHILLIPS: Actually, just the opposite is true. When pilots challenging the Age 60 Rule had Golaszewski's accident rates recalculated without all those airline flying hours, the accident rates for active pilots in their 40's and 50's was higher than for pilots in their 60's. And pilots in their 70's had the lowest accident rate of all.

Mr. GOLASZEWSKI: I'll be the first one to admit that it's not the last word on the subject, that more research needs to be done. But you have to realize, in fairness, that I never set out to answer this question about the performance of airline pilots.

It long has been known by FAA and now is revealed by petitioners, that FAA itself has been aware, ever since it received the Golaszewski study, that it had unacceptable "major data deficiencies" and "other problems," rendering it unsuitable for publication and "questionable at best" in relation to supporting "any position."[251] The FAA's Ken Chin, who provided technical support for the study, indicated in his letter to Samuel D. Woolsey that the Golaszewski study had been discredited upon its delivery and was of no use.

Golaszewski, as project manager, submitted the Final Report, "The Influence of Total Flight Time, Recent Flight Time and Age on Pilot Accident Rates"[252] to Mr. Chin, Safety Analysis Division, FAA Office of Aviation Safety, June 29, 1983. Golaszewski's transmittal letter was on stationery of Acumenics Research and Technology, Inc. of Bethesda, Md.

FAA never has publicly acknowledged the fact that the Golaszewski study was deficient, unreliable, unacceptable and unsuitable for publication, but it was acknowledged in a letter by FAA's Chin to Woolsey. Referring to the Flight Time Study, Chin wrote:

> It should be noted that our study is unofficial because it was *never formally published* by the Federal Aviation Administration....
>
> Under my management and technical direction, the analysts with Aviation Safety and contractor employees of Acumenics Research and technology, Inc., supported Operations Research Branch in the development of the concepts and information

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[251] Chin, *supra* note 81.

[252] Purchase order no. DTRS57-83-P-80750.

> relating accident rates and pilot experience. We have *not formally accepted* this study as a final product because there are *major data deficiencies. Other problems* with the study have been discussed by experts in the aviation field as well as within my office. ....
>
> Your use of this study to support any position may be *questionable at best.*"[253]

Even after the Golaszewski data had been proven false, the FAA continued to use it to promote mandatory retirement of air carrier pilots at age 60. False information intentionally was given to and unwittingly used by two arms of Congress – the Government Accounting Office[254] and the Office of Technology Assessment.[255]

The agency also submitted the Golaszewski data as "fact" to the United States Court of Appeals for the Seventh Circuit in *Baker v. FAA.*[256] But the *Baker* court – understanding and

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[253] Chin, *supra* note 81. (Emphasis added.)

[254] Government Accounting Office, *Fact Sheet for Congressional Requesters: Aviation Safety*, GAO/RCED-90-68FS (Jan. 1990).

[255] Office of Technology Assessment, Memorandum (1990).

[256] 917 F.2d 318 (7th Cir. 1990). In *Baker*, the FAA devoted 20 percent of its brief – six of the 33 pages – to defending its reliance on the clearly false and misleading presentation of the Golaszewski data to the court. FAA declared on knowledge and belief in its brief (pp. 6-8):

"The study upon which the FAA has primarily relied but not solely is a 1983 report entitled, 'the Influence of Total Flight Time, Recent Flight Time and Age on Pilot Accident Rates,' hereinafter referred to as the 'Flight Time Study.'" [*But this was the study the FAA rejected on delivery in 1983 as seriously flawed and on that basis refused publication.*]

"Graphically depicted, the results of the Flight Time Study for all classes of pilots reflect a 'U' curve across age groups for aviation accident rates."[*But the "U" curve results from the false depression of rates on account of the inclusion of accident-free air carrier flight hours in the denominator for pilots under age 60 and their exclusion from the*

accepting the fundamental flaw described by Drachman and affirmed by a myriad of other reviewers -- discerned that the study lacked credibility on its face. Coming to the same conclusions as had Drachman, Stuck, Williams, Koonce, and others, the court said:

> Perhaps the Flight Time Study's greatest failing is that the data for pilots under age sixty include millions of relatively safe air

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denominator for pilots over age 59; this statistical fallacy has been criticized repeatedly by experts, even including some hired by the FAA.]

"The Flight Time Study does focus on subsets for the pilot population who have passed medical standards required of airline pilots such as the petitioners." [*But the FAA (or its predecessor agency, the CAA) had known since 1956, from its own research, that analysis of air carrier accident rates based on medical class alone was not valid. CAA Office of Aviation Safety,* The Age Distribution of Captains in Air Carrier Accidents *(July 1956), 2, said regarding data it reviewed: "The above comparison of accident rates with pilot age does not take into account the fact that some of the pilots holding Class I Medical Certificates did not have Airline Transport Pilot Ratings during the period under study, which the captains of the airplanes involved in the accidents under consideration held. By considering only pilots with Active Transport Pilot Ratings it becomes evident that the trends suggested by the above calculations are unreliable." (Note also that this was one of 40 studies cited by Quesada to Sayen as supposedly having been relied on in formulating the age 60 rule).*]

"The study represents the best available statistical analysis found regarding the relationship of experience and age to aviation accident rates while accounting for exposure." [*But Golaszewski himself admitted in his study that no statistical analysis had been done. The failure to make such an analysis – as well as the flawed justification advanced by the author – was severely criticized by subsequent reviewers, including some under contract to the FAA.*]

"It contains the best information and most closely parallels the relative accident rates that would be expected of airline pilots if the age 60 rule were modified to permit airline pilots to pilot airline aircraft after age 60." [*No greater condemnation of FAA's conduct can exist than for the agency itself to describe information that it had recognized as discredited and also refused to publish, which the author himself admitted to be flawed in methodology and intended to address a totally different issue, and uniformly criticized in scientific publications, including some under FAA contract – and then for the FAA to declare in a verified brief to the federal court that the discredited study was "the best information" available.*]

> carrier miles flown, miles which because of the age sixty rule were unavailable to pilots over sixty. In calculating the accident rate for pilots sixty and older, the Flight Time Study divides the number of general aviation accidents by general aviation flight time, the only category open to this group. But for pilots under age sixty, the study divides the number of general aviation accidents by general aviation flight time and, in addition, air carrier operations flight time. Because miles flown in air carrier operations are nearly accident free, millions of these extra miles are included in the figures for younger pilots but not for older ones, whose accident rate is overstated. Indeed, looking at the Flight Time Study's chart of accident risk for Class I (airline transport) and Class II (commercial) pilots with greater than 5,000 hours total flight time...the jump in accidents at age sixty to sixty-nine from age fifty to fifty-nine simply looks too large to be credible.[257]

Footnote 1 in the opinion of the Seventh Circuit said, *inter alia*, "Numerous comments of record from various experts, even some from the FAA, state that the study should not be relied on as determinative - - or even probative - - on the question of the continued validity of the age sixty rule." The *Baker* case did not give rise to the question of whether the Agency's use of the Golaszewski study amounted to intentional misrepresentation because the record did not include evidence that senior Agency officials were aware of the falsity of its findings and used the study anyway for ulterior (economic favoritism, not safety) purposes.

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[257] *Baker v. FAA, id.*

It is evident that FAA officials knowingly used the falsified numbers and graphs not only to deceive the American public, the U.S. Congress and the federal courts, but also to deceive the nation's treaty partners in the international community. The International Civil Aviation Organization, a United Nations affiliated organization, received the invalid and misleading flight safety data from the FAA. Unwittingly, ICAO reproduced the FAA disinformation, and sent it to member states. Graphs falsely representing that pilots age 60 and older had higher accident rates than younger pilots, attributed to the Federal Aviation Administration, Washington, D.C., were published as appendices to a paper published by the ICAO Air Navigation Commission.[258] Because the graphs themselves and the information they conveyed had been so widely repudiated, FAA deception regarding the age 60 rule thus has damaged the credibility of the United States as a member of the community of nations.

The FAA's lack of credibility on the subject of safety arguments for the age 60 rule is demonstrated also by self-contradictory statements FAA has made in domestic and international fora. As we have seen, the FAA often has stated that its continued enforcement of the age 60 rule is based on safety data. The agency has made this assertion in notices in the federal register, briefs in federal court and elsewhere. When the FAA announced in 1995 that the age 60 rule would be applied starting four years later to most part 135 operations, including pilots, it specifically stated that the reason for this decision was safety data.[259]

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[258] ANC Task No. MED-7101: Upper Limits for Flight Crew Members, Discussion Paper No. 1, Related to AN-WP/6538, Air Navigation Commission, International Civil Aviation Organization, April 29, 1991.

[259] 60 Fed. Reg. 65832, 65833, 65843 (Dec. 20, 1995).

"Recent part 135 commuter accidents have focussed the public, government, and industry attention on the safety of commuter operations." [p. 65832]

However, when the International Civil Aviation Organization requested such data in a survey of member nations,[260] the FAA - notwithstanding the fact that most part 135 captains were required to hold the same credentials as part 121 captains, and *all part 135 pilots* (captains included) *were allowed to fly* - and many did fly - *past age 60* - responded that it had never accessed any such data. FAA told ICAO that such data exists but that FAA did not even know whether it was accessible.[261] If FAA's response to the

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"FAA has identified a strong need to enhance the safety of commuter operations. . . . commuter airlines operating under part 135 continue to have a higher accident rate than domestic part 121 airlines. The FAA can no longer justify most distinctions between parts 121 and 135 commuter operations. [p. 65843.]

[Extending] the Age 60 Rule [to part 135 commuters] provides an additional measure of safety by reducing the risk that age related degradation will affect pilot performance. [p. 65843.]

[260] ICAO's Air Navigation Commission asked member states to provide information about age limits and medical as well as operational factors pertaining to certification of pilots over age 60. The survey was initiated because the commission was reevaluating the supposed aeromedical foundation for its rule. International Civil Aviation Organization, Air Navigation Commission, *ANC Task No. MED-7101: Upper age limits for flight crew members*, AN-WP/7089, Feb. 15, 1996. According to the ICAO rule, a member state has the option of excluding foreign air carrier pilots age 60 and older from its airspace. The ICAO rules are pursuant to the Convention on International Civil Aviation (the Chicago Convention of 1944), 61 Stat. 1180, T.I.A.S. 1591, 15 U.N.T.S. 295, 3 Bevans 944.

[261] ICAO reported:

"The United States does not have recent experience with pilots above the age of 60 in operations conducted under Part 121 of the FAR. Because pilots over the age of 60 may continue to fly in operations conducted under Parts 91 and 125 through 137 of the FARs, a body of experience and knowledge exists as to those pilots. However, the U.S. Federal Aviation Administration (FAA) is uncertain whether, and to what degree, this information is readily accessible." AN-WP/7089, Appendix B, Feb. 15, 1996. See Exhibit X.

Yet the very ready accessibility of such older pilot safety data was illustrated by an independent survey conducted by Captain Robert R. Perry, who found that 31 pilots, who flew part-121 airliners until their 60th birthdays and subsequently piloted aircraft in part 135

ICAO survey was true, it logically follows that FAA's claim that it based the part 135 rule extension on safety data must have been false. If the FAA had not even determined whether such data was accessible, it could not have based the extension decision on such data as it claimed to have done. It is troubling, to say the least, that the FAA report to ICAO, conceding that such data was available but not accessed, came 14 years after the National Institute on Aging criticized FAA for failing to examine more fully data on older pilots' safety performance. It is evident that FAA intentionally has shut its eyes to the available data while falsely representing to Congress, the courts and the world that its age policy was based on factual data.

The FAA's failure to earn any credibility at all on issues related to the age 60 rule may be partly a result of the

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operations, logged more than 100,000 hours after turning age 60 without a single accident or incident. The significance of Captain Perry's survey is that is shows the implausibility of FAA's claim that it could not determine whether data on this subject could be accessed.

Still another readily available source of data was the FAA's *Annual Report on the Effect of the Airline Deregulation Act on the Level of Safety*, June 1990. Mandated by the Congress (Section 107 of the Airline Deregulation Act of 1978 (Pub.L. 95-504)), this report provided detailed, annual safety data for part 135 operations - both scheduled and non-scheduled (air taxi) - between 1975 and 1988.

A more reliable and more relevant source of the information sought by the ICAO committee was available from data readily accessible using the sources and methodology developed by Edwin Kay in his discriminating data query for Table B-6B of his 1993 Consolidated Database Experiments. For the relevant time frame, 14 CFR 135.243(a) required that captains of turbojet powered aircraft, those with a passenger seating capacity of ten or more seats, and multi-engine aircraft operated under Part 135 rules must possess both the Class I medical certificate and the ATP pilot's license. Moreover, these were the very pilots and aircraft brought under the Part 121 rules by the changes announced in 60 Fed. Reg. 65832 et seq. Dec. 20, 1995. For the FAA to deny the existence of this data in final, reviewable form is to admit that it had no basis for the drastic regulatory change it imposed.

inability of the FAA bureaucracy to accept new information and new ideas. This bureaucratic paralysis was illustrated in a 1973 memorandum by the FAA Flights Standards Director, James F. Rudolph. The memorandum said the Flight Standards office would not recommend raising the mandatory pilot retirement age because (a) there was "no new data or information" on safety-related medical evidence, (b) the FAA "has 'stood firm' in the past" on age 60 and been upheld by the courts, (c) it would be "difficult" to file a rule change with the International Civil Aviation Organization "since the ICAO rule was based on the U.S. age 60 rule." [262] The memorandum revealed that the FAA flight standards director had no awareness of or interest in any of the medical and safety data accumulated throughout the history of aviation medicine up to that time. The memorandum rationalized inaction on the basis that having "stood firm" in the past proved to be a legally safe course. That kind of bureaucratic mindset (which says change should not be accepted simply because it has not yet been accepted) is hardly a rational approach to governance. Finally, the memorandum reflected ignorance of the U.S. relationship to ICAO. Senior FAA officials seemed unaware that, under articles 37 and 38 of the ICAO Convention, the United States could change or rescind its age 60 rule any time it chose, and had only to inform the international organization at that time.[263]

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[262] Memorandum by James F. Rudolph to AOA-1, October 18, 1973. (From the Reighard files.) (See Exhibit GG.)

[263] Indeed, the majority of ICAO member States no longer consider the rule relevant. In the most recent (June 2000) Supplement to Annex 1 (8th Ed.) Personnel Licensing, only 25 States had filed a Difference with respect to the ICAO (captains only) age 60 rule. *Yet*:

> An official ICAO survey in 1995 (73 States responding) indicated 13 States had no age limit; 57 States (78%) allow pilots to fly beyond age 60 (some with conditions, age 65 the choice of most). Of those that allow flight beyond age 60, none reported problems, incidents, or accidents with the older pilots, and 26 States (36%) anticipated changing their national regulatory limit within 3 years. (AN-

The FAA's complete lack of credibility on the safety issue is further demonstrated by contradictions between the agency's actions and its words. FAA officials have alleged that safety is the reason for having the age 60 rule. However, for many years FAA did not bother to enforce the age rule against pilots of foreign air carriers flying into the United States. If safety were the real motivating force behind the FAA's age 60 rule, the agency would have enforced it against pilots of foreign as well as U.S.-based air carriers. The fact that the agency enforced the rule only against domestic air carrier pilots is consistent with the fact that the rule actually has been intended by the agency to serve as an act of purely economic favoritism for U.S. airline managements. FAA did not even begin to enforce the age rule against foreign airlines until it was publicly embarrassed into acting, fifteen years after it could have done so.

The FAA, if it had really thought age was a safety problem, could have started enforcing the age 60 standard against

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WP/7089, 15/[Feb.]/96.)

In 1996 (updated in year 2000), the U.K. CAA (British FAA equivalent) sought exemptions for captains of British registered carriers up to age 65 from those States to or over which their British carriers operated. Of 117 responding States, 82 (70%) granted blanket authority (some with restrictions). Of the remaining 25 States, some offered individual permissions on application. Ten States (8%) responded that the request was "under consideration." (e-mail message, Neil Monks to Samuel Woolsey, 28 Jun., 2001.)

In 1999 (updated in 2001), Israel's El Al airline management similarly sought exemptions (to age 65) from those member States to or over which El Al flew. Of 65 responding States, 46 (73%) granted the exemptions to El Al's captains, with 39 (62%) granting blanket/unlimited permission. (Letter, Capt. Reuven Harel to Omri Talmon, 5th April, 2001 - updating Harel e-mail to Alan Serwer dtd. 15 Nov. 2000.)

Also in 1999, virtually the whole of Europe (through the JAA) adopted age 65 as a maximum age limit for one pilot (captain or co-pilot) - with the other qualified pilot under age 60.

foreign airlines in 1978, under the ICAO rule. After all, airline pilots perform the same job, use the same equipment and fly under the same conditions regardless of whether their employer is based in the United States or abroad. The National Transportation Safety Board, investigating an airliner crash in Suriname in 1989, discovered then that FAA had not been enforcing the age 60 rule against foreign airlines flying into the United States.[264] Six months later, FAA requested that ICAO be asked to require that the date of birth be shown on pilot's licenses,[265] a simple step that could have been taken years earlier to enable consistent enforcement. Almost two years after that, FAA issued a handbook bulletin announcing that, starting in mid-January 1993, foreign airlines would not be allowed to have pilots aged 60 or older flying into the United States.[266] Even then the FAA's actions continued to belie its public posture. While the agency imposed absolutely inflexible enforcement of the age 60 rule on U.S. air carriers (supposedly for safety reasons), it granted waivers to some of the foreign airlines for up to three additional years.[267] These waivers, denied to pilots of U.S.-based air carriers but granted to pilots of some foreign airlines, were issued with no reference made to any safety concerns but rather out of concern for the airlines' scheduling convenience and economic interest.

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[264] National Transportation Safety Board, Safety Recommendation, to James B. Busey, FAA Administrator, Apr. 24, 1990.

[265] IGIA 82/2.33, Dept. of Transportation, Oct. 16, 1990.

[266] Pilot-in-Command Age requirement for Part 129 Operators, Order 8400.10, Appendix 3, HBAT 92-06, July 14, 1992.

[267] See Exhibit HH.

(III) -- THE GRANT OF EXEMPTIONS FROM THE AGE 60 RULE, 14 CFR 121.383(c), WILL BE IN THE PUBLIC INTEREST.

The Federal Aviation Administration has authority under 49 USC 44701(f) to grant the exemptions here requested, regulatory exemptions in the public interest.[268]

(III) (A) -- Exempting the Petitioners from 14 CFR 121.383(c) will be in Accord with the Public Interest in Air Safety as Envisioned in 49 USC 40101(a)(1).

The United States Department of Transportation (DOT), inclusive of the FAA, has a duty, under 49 USC 40101(a), to provide for the public interest in safety as the top priority in commercial air operations.[269]

Granting the requests of petitioners who, as here, have met, or will meet, all regularly published medical and performance standards applicable to all pilots would be consistent with the priority of public interest in aviation safety.

Evidence presented in this petition has shown, *inter alia*: The age 60 rule never has had a safety purpose. From its inception, the rule has been intended as a tool of economic favoritism. The agency willfully has distorted data so as mislead the public and official bodies. The FAA for decades has misrepresented the purpose of the rule, while using

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[268] "The Administrator may grant an exemption from a requirement of a regulation prescribed under...sections 44702-44716 of this title if the Administrator finds the exemption is in the public interest." 49 USC 44701(f). Authority to grant exemptions is found in several places in Title 49 of the U.S. Code.

[269] "[T]he Secretary of Transportation shall consider the following matters, among others, as being in the public interest... (1) assigning and maintaining safety as the highest priority in air commerce." 49 USC 40101(a).

disinformation to make it appear that the rule enhances public safety.

(III) (B) -- In View of the Fact That the Rule Has No Safety Basis, the Agency's No-Exemptions Policy Appears to be Inconsistent with the Public Policy, Recognized in 49 USC 40101(a)(4), of Preventing Unreasonable Discrimination.

The age 60 rule has no basis in safety. Discrimination that has no safety basis is inherently unreasonable. Such discrimination is contrary to the public policy of the United States. The Age Discrimination in Employment Act of 1967 declares in its Statement of Findings and Purpose:

> Sec. 2. (a) The Congress hereby finds and declares that –
> (1) in the face of rising productivity and affluence, older workers find themselves disadvantaged in their efforts to retain employment, and especially to regain employment when displaced from their jobs;
> (2) the setting of arbitrary age limits regardless of potential for job performance has become common practice, . . .
> (4) the existence in industries affecting commerce, of arbitrary discrimination in employment because of age, burdens the free flow of goods in commerce.
>
> (b) It is therefore the purpose of this Act to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment....[270]

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[270] Age Discrimination in Employment Act of 1967, Pub. L. 90-202, Dec. 15, 1967.

Particularly when inflicted by government itself, unjustified age discrimination is inconsistent with the principles of equal protection and due process. DOT, inclusive of FAA, has a statutory duty to prevent unreasonable discrimination.[271] Nevertheless, it has been the practice of the FAA for the past four decades to follow a no-exemptions policy, meaning that the agency automatically rejects all petitions for exemption to the age 60 rule. The practice of automatically rejecting all petitions for exemption from the age 60 rule is unreasonably discriminatory. The agency has not granted a single exemption request since the rule was promulgated in 1959. Where there is no safety justification, forced retirement at age 60 is unreasonable. Evidence presented in this petition has established that there is in fact no safety basis for this discrimination against pilots in air carrier operations.

Despite the command of Executive Orders to coordinate with the EEOC on its discriminatory policies and practices, the FAA has failed to accommodate requests by United States Equal Employment Opportunities Commission (EEOC) to rescind the age 60 rule.[272]

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[271] "[T]he Secretary of Transportation shall consider...as being in the public interest...(4) the availability of a variety of adequate, economic, efficient, and low-prices services without unreasonable discrimination or unfair or deceptive practices." 49 USC 40101(a)(4).

[272] EEOC Chairman Tony E. Gallegos wrote to the FAA Office of Chief Counsel in 1993:

> [T]he U.S. Equal Employment Opportunity Commission...enforces the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. 6212 et seq. (ADEA) and also provides leadership and coordination for all Federal agencies' EEO programs under executive Order 12067. The Executive Order requires the FAA to coordinate with EEOC to insure that its rules are consistent with the Commission's interpretation of the ADEA. .... Under the ADEA, it is unlawful for an employer to have a maximum age limitation for its employees unless the employer can

establish that the age limitation is a bona fide occupational qualification (BFOQ) 'reasonably necessary to the normal operation of the particular business.' 29 U.S.C.A. 623(f)(1) (West 1985). An EEOC regulation sets forth what an employer must prove to establish that age is a BFOQ:

'That (1) the age limit is reasonably necessary to the essence of the business, and either (2) that all or substantially all individuals excluded from the job involved are in fact disqualified, or (3) that some of the individuals so excluded possess a disqualifying trait that cannot be ascertained except by reference to age. If the employer's objective in asserting a BFOQ is the goal of public safety, the employer must prove that the challenged practice does indeed effectuate that goal and that there is no acceptable alternative which would better advance it or equally advance it with less discriminatory impact.' 29 C.F.R. 1625.6(b) (1992).

The EEOC does not believe that a chronological age limitation for commercial pilots is a BFOQ because pilot skills and health can be assessed accurately on an individual basis, regardless of age. Indeed, the FAA itself relies on individualized testing as a basis for issuing medical certificates to people of all ages, including those 60 and above, who serve as pilots in non-Part 121 flight operations. Moreover...EEOC's experts have testified that Class I medical testing is fully sufficient to identify health or performance problems that may surface for pilots regardless of age.

....

The report titled 'Age 60 Project, Consolidated Database Experiments, Final Report' (Hilton Report)...prepared for the Civil Aeromedical Institute of the FAA, supports the conclusion that the age 60 limit for pilots is not defensible as a BFOQ under the ADEA. ....This conclusion is especially significant in light of the report's avowedly conservative interpretation of the data.

In sum, the Age 60 Rule should be lifted by the FAA. Medical and proficiency tests on an individual basis are effective and non-discriminatory ways to assure that commercial pilots maintain the highest standards of safety at all ages."

–Tony E. Gallegos, Chairman, EEOC, letter to FAA Office of General Counsel, October 14, 1993. See Exhibit II.

Petitioners do not aver that all age-based standards and criteria are impermissible - witness age-based increases in blood pressure limits and the requirement for electrocardiograms beginning at age 40 for the first class medical certificate. However, petitioners do charge that the imposition of an arbitrary, chronologic age-based standard - while denying access to independent *de novo* review (of the practice generally as well as the individual petition) and denying access to "ability to perform" tests as are accorded pilots under age 60 - violates basic concepts of due process and equal protection. FAA's unfounded references to "aging" as a disease to be diagnosed and treated as are diabetes, AIDS, and cancer, are specious at best. These officious pronouncements are more properly recognized as disingenuous straw-men manufactured at the behest of the original proponent of the rule, C.R. Smith; embellished on advice of FAA in-house counsel who recognized the rule was unsupportable on experience or science; and perpetuated by bureaucrats adamant about not wanting to inconvenience their friends in the industry they are responsible for regulating.

Moreover, the United States stands almost alone among major commercial air powers in denial of the rule's discriminatory effects and its enforcement of mandatory age 60 retirement of all airline pilots - including co-pilots.[273] The increasingly widespread practice of other countries that certify major airlines, in allowing fit captains to fly beyond age 59, is consistent with the development of customary

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Chairman Gallegos' letter also noted that EEOC Chairman Clarence Thomas (now Justice of the U.S. Supreme Court) had written an August 12, 1986 letter urging FAA Administrator Donald Engen to grant age 60 exemptions for 39 airline pilots so they could take part in a study proposed by the NIA panel.

[273] While the United States is virtually alone in imposing mandatory age 60 retirement on airline captains, the United States is completely alone in imposing the mandate on copilots.

international human rights standards disapproving of unreasonable age discrimination where it serves no safety purpose. Recognition that the age 60 rule is not based on safety considerations is manifest in court decisions, statutes and constitutions of other countries and protections afforded by international law through their rejection of an arbitrary age standard. The FAA policy of refusing all exemptions to the mandatory age 60 retirement rule on nothing better than outmoded and discredited "safety" claims is out of step with emergent civil and human rights standards worldwide.[274]

Unlike authorities in other countries,[275] the FAA rigidly enforces the age 60 rule against U.S. airline pilots, in total disregard of the available evidence - both empirical and conceptual.[276]

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[274] While the ICAO standard established age 60 as the minimum age that signatory member states are permitted to enforce against pilots of foreign-certified airliners, the trend has been for governments to refrain from imposing any automatic age limit.

[275] The British equivalent of the U.S.' FAA solicited waivers for pilots of Britisn certificated carriers to permit them to fly to and through other countries past age 60.

[276] For example, Australia's Human Rights and Equal Opportunity Commission, which noted: "The detailed examination of the medical evidence led the Chief Justice [in *Allman v. Australian Airlines Ltd.* and *Christie v. Qantas Airlines Ltd.* judgment of May 18, 1995, Industrial Relations Court, [1995] AILR. 1,623 (3-134)] to conclude that despite the considerable time and effort in America spent studying the age 60 rule 'none of the cited studies supports any conclusion about the relationship between that rule and aircraft safety'...." *Bone et al. v. Qantas Airlines Ltd.*, Human Rights and Equal Opportunity Commission, Notice Under Section 35 of the Human Rights and Equal Opportunity Commission Act 1986, Concerning Equal Opportunity in Employment, p. 12. In pursuance of obligations under the International Labor Organization Discrimination (Employment and Occupation Convention 1958 (ILO 111), Australia's Human Rights and Equal Opportunity Commission Act 1986 provides protections analogous to those in U.S. civil rights laws. Compulsory retirement of

(III) (C) -- Agency Disinformation Concerning the Age 60 Rule and the Agency's No-Exemptions Policy Contravene Public Policy, Reflected in 49 USC 44701(a)(4), Disfavoring Deception.

Government dissemination of false information is contrary to the public policy of the United States.[277] The U.S. Department of Transportation, inclusive of FAA, has a statutory obligation to prevent, not practice, deceptive methods.[278] Evidence presented in this petition has shown: The agency for decades knowingly has deceived aviators, the public, the press, the Congress, the courts and the international community when it comes to the age 60 rule and the no-exemptions policy. The agency has concealed the more than 40 years of economic and personal favoritism that underlies both the rule and its rigid enforcement. The agency falsely has made it appear that the purpose of these forced retirements is public safety. It appears that intentional disinformation has kept the citizenry from obtaining accurate information about the functioning of the agency - and confused America's treaty partners in the international community. FAA official propaganda has tainted the political process and the judicial process - and tarnished our nation's reputation amongst the ICAO member States. It has harmed the interest of aggrieved persons who would petition for redress. It has harmed the traveling public by depriving passengers of the benefits of the most experienced and demonstrably safest pilots. It has harmed the nation by corrupting governmental processes. It has obstructed the fundamental right of the people and the Fourth Estate to know what the government is up to.

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airline pilots at age 60 was unlawful discrimination under the Act, according to the *Bone* ruling.

[277] See 49 USC 40101(a)(4).

[278] *Id.*

(III) (D) - - Granting Reasonable Requests for Exemption to the Age 60 Rule Will Help Curb Airline Recruiting of Military Pilots, Support the War Against International Terrorism and Protect the National Security and Defense Interest of the Nation, Pursuant to 49 USC 40101(a)(7)(C), (c)(1), (d)(1), and 49 USC 44701(a)(5).

Civilian agencies of government have a duty to administer regulations in a sufficiently responsible manner to help ensure that the nation's defense and security needs will not fall short. The FAA is subject to statutory mandates to take into account the requirements of both national defense[279] and national security.[280] Rigid FAA enforcement of the age 60 rule forces airlines more aggressively to recruit military pilots. Relaxing the FAA's no-exemptions policy would help the armed services, which are unable to replace combat-ready pilots as fast as the airlines hire them away, and which need to hold onto more of their trained pilots, particularly in times of national emergency. This has been a problem in the past and it is likely to be a problem in the future.

The FAA's public position, that "military downsizing" will lessen the impact of the age 60 rule,[281] is unresponsive to the

---

279 "[T]he Administrator of the Federal Aviation Administration shall consider the following matters: (1) the requirements of national defense...." 49 USC 40101(c). "[T]he Administrator shall consider...as being in the public interest: ...(2) regulating air commerce in a way that best promotes safety and fulfills national defense requirements." 49 USC 40101(d)(2).

280 "The Administrator of the federal Aviation Administration shall promote safe flight of civil aircraft in commerce by prescribing...(5)...methods, and procedures the Administrator finds necessary for safety in air commerce and national security." 49 USC 44701(a).

281 "We work hard to manage a growth oriented aviation system - - and the constraints on the system that growth imposes - - in the most efficient and safe way possible. .... In addition, military downsizing will ultimately reduce the importance of ex-military pilots as a source

agency's statutory duty. The military is not always downsizing. The nation today finds itself in a state of war, a war against global terror, that demands increased military readiness over the long term.

Karen Keesling, Assistant Secretary for Manpower and Reserve Affairs, U.S. Air Force, testified more than a decade ago: "The military, and most particularly, the Air Force, is the single largest procurer and producer of pilots in the United States, yet we are currently losing 1,000 more pilots a year than we train, a loss counted in billions of dollars of training and experience with a potential to greatly affect our readiness posture."[282]

The age 60 rule, by causing airlines to hire away military pilots at a faster pace, harms U.S. war readiness. The nation's military preparedness is a public policy interest of the highest priority at all times but most particularly in time of war and national emergency. U.S. Sen. John McCain (R-Ariz.) in a Senate hearing told airline executives, "91 percent of your pilots are former military," adding:

> "You are responsible for siphoning off a large number of military pilots.... However, the fact is that you are getting $6 million men, according to the Chief of Staff of the Air Force, for a job that requires about a $100,000 education. ...[T]he taxpayers are paying for their education and training to the tune of millions of dollars. ...General Cassidy,

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for civilian airlines." L. Nicholas Lacey, FAA Director of Flight Standards Service, statement before the U.S. Senate aviation subcommittee, July 25, 2000.

[282] Karen Keesling, Assistant Secretary for Manpower and Reserve Affairs, U.S. Air Force, testimony, Aviation Subcommittee hearing on pilot supply and pilot training, U.S. Senate Commerce Committee, 101st Cong. 1st Sess., Aug. 3, 1989, p. 7.

> Commander-in-Chief of U.S. Transportation in MAC, testified...saying the shortage of pilots is a war-stopper. A war-stopper, I might remind you, means that we cannot fight because of our lack of military pilots."[283]

All Americans have a moral obligation to do what they can to support the current war effort against international terrorism. Having our most experienced, safe airline captains in command of commercial air carrier flights is one of the most effective ways to minimize the danger to the flying public and the national interest in the event of terrorist emergencies in the air.

(III) (E) - - Granting Reasonable Requests for Exemption to the Age 60 Rule Will Help Curb Major Airlines' Recruiting of Pilots from Regional and Charter Lines and Protect the Interest of Small and Rural Communities, Consistently with 49 USC 40101(a)(11).

The age 60 rule has had, and it is likely to have in the future, an adverse impact on retention of pilots needed by regional and charter airlines serving small and rural communities.

Senator McCain, Chairman of the United States Senate Commerce Committee, echoing his well-known concern for shortages in experienced airline pilots, said in year 2000,

> For several years I have been concerned about pilot shortages in our armed forces, which can affect our combat readiness. Some of the same factors that influence military pilots [shortages] are now having an impact

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[283] U.S. Sen. John McCain (R-Ariz.), Aviation Subcommittee hearing on pilot supply and pilot training, U.S. Senate Commerce Committee, 101st Cong. 1st Sess., Aug. 3, 1989, p. 49.

> on certain parts of the private sector. A strong economy...lead[s] to record numbers of pilots being hired by the airline industry. Just as generous pay scales and benefits of the major airlines have attracted pilots out of the military, smaller carriers are losing flight crews to the big players in the industry.
>
> But the supply of qualified pilots has been negatively impacted by the fact that there are now fewer ex-military pilots on the market. .... Airline expansion has been traditionally supported by large numbers of ex-military pilots....[S]maller and rural communities [are served by]...[r]egional airlines and on-demand operators...an essential transportation link for many areas of the country.[284]

Linda Barker, Chairperson of the National Air Transportation Association, testified:

> The uncertainty over whether your pilots employed today will be there tomorrow is stifling many air charter operators from expanding their services.... This disproportionately impacts on the less populated areas of the country that receive little airline service.
>
> The shortage of pilots becomes critical when you consider the need for medical access provided by [air] emergency medical services

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[284] U.S. Sen. John McCain, Chairman, Senate Committee on Commerce, Science, and Transportation, statement before the Aviation Subcommittee hearing on the impact of pilot shortages on rural air service, July 25, 2000.

> that may be the only link for smaller communities to medical specialists. The shortage threatens the expansion of medical services to smaller and rural communities. ....
>
> Commerce and the economic viability of communities are likewise dependent upon access to air transportation.
>
> ...[A]llowing pilots to continue working for an airline past 60 would decrease the demand for new pilots. Likewise, it would provide for these pilots with thousands of hours of accumulated flight time experience to continue serving the traveling public.[285]

The availability of air-dependent medical services in every American community is a matter of heightened urgency because of the ongoing threat of terrorist attack.

Because of circumstances following the terrorist attacks of September 11, 2001, there has been a significant decline in the large numbers of non-citizens enrolled in civilian U.S. flight training schools. This trend will have a tendency to depress the supply of newly qualified pilots in the United States. Over time, the resultant supply-demand curve in the employment market for pilots is likely to make it even more difficult for regional and charter airlines to provide reliable, regularly scheduled service to rural and small communities across America.

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[285] Linda Barker, Chairperson of the National Air Transportation Association, testimony before the U.S. Senate aviation subcommittee (July 25, 2000).

(III) (F) - - Granting Reasonable Requests for Exemption to the Age 60 Rule Will Strengthen the Competitive Position of American Air Carriers Toward Equality with Foreign Carriers.

The United States Department of Transportation (DOT), inclusive of the FAA, has a duty, under 49 USC 40101(a)(6)(B), (a)(7)(A), (a)(15), to provide for the public interest in strengthening the competitive position of U.S. air carriers in the international marketplace. As the revelations of the recent ICAO surveys show an overwhelming majority of foreign States - including those of the European Community, the largest and most aggressive of America's competitors in commercial aviation - are abandoning *en masse* even the more limited (captains only) international version of the age 60 concept. While American ability to enforce the international rule on captains (only) in U.S. airspace mediates the imbalance in the economic impact of the age 60 rule for transportation to and from the U.S. (shorter working life, replacement training costs, etc.),[286] the favor is not returned by the foreign competitors on their own turf. FAA's rigid enforcement of this "arbitrary, overly broad and outmoded presumption, smelling of age discrimination,"[287] the age 60 rule and no-exemption policy harms the nation's interest. The FAA has an affirmative statutory duty, at long last, to abandon its no-exemption policy and to grant the exemptions here requested.

(IV) - - CONCLUSION

The history of the age 60 rule reveals that it never had a safety purpose but rather has been a tool of economic

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[286] These are the same criteria FAA cited when extending the compliance date (i.e., extending blanket; 4-year waivers) to part 135 pilots converting to part 121. 60 Fed. Reg. 65843 Dec. 20, 1995.

[287] *Baker v FAA*, 917 F.2d 318, 325 (7th Cir. 1990) (Sr. Chief Judge Will, dissenting.)

favoritism. This misguided policy is the result of the agency's unseemly close ties to elements within the industry it is charged with regulating.

Congress has given the FAA law to apply, indicated congressional intent to circumscribe agency discretion and provided meaningful standards for defining the limits of that discretion. The agency thus far has failed to perform its statutory duty to gather and take into account empirical evidence regarding the safety and public interest factors that are supposed to determine exemption decisions.

When studies by Orlady, Buley, Lane, Chapman, Harper and Kidera, Bruggink, Drachman, Stuck, Kay, and others challenged the supposed basis for the rule, and the international community increasingly moved away from the rule on substantive grounds, and the NIA panel found that there was no medical basis for the rule, certainly FAA was on notice that the purported safety rationale for the rule was dubious at best. Even at the strenuous and explicit urging of a congressionally mandated review by an impeccable panel of aviation experts, the agency neglected its duty - both statutory and moral - to honestly and thoroughly examine the validity of the rule. Moreover, FAA's loading of the Goddard report, suppressing of the Mohler-Austin revelations, misrepresenting its disastrous Georgetown debacle to the Congress and GAO, and the Booze data to the NIA panel, then manufacturing and misrepresenting the Golaszewski and Broach studies, presenting inappropriately manufactured accident data to the public and official bodies - both domestic and international - as "the best scientific evidence available," add up to bureaucratic misconduct preventing the agency from meeting its statutory obligations. It is an irrational rule, harming that which it is supposed to help. The American people, their elected representatives, the courts and the world at large have been

too long deceived by FAA's misrepresentations on the age 60 issue. It is time for this fraud to end.

Considering the public interest factors that FAA has a statutory duty to consider, the agency should grant the exemptions here requested.

(V) -- FEDERAL REGISTER

Note: Regarding Whether FAA May Grant the Exemptions Requested Here Without Prior Notice in the Federal Register

Although rigidly enforced for more than 40 years, the FAA's "no-exemptions" policy is an informal, unpublished practice that never has been institutionalized through either formal or informal rulemaking. Thus, a formal process to change this informal, unpublished policy to allow for the grant of the requested exemptions, including notice and comment, is not only unnecessary, it would be improper. Moreover, as the FAA previously has practiced and publicly affirmed the relaxation for the grant of waivers, such as requested here, without prior public notice and comment. Reference is made to the relaxation of waiver requirements as set forth in Amendment 67-4. In that amendment, waiver requirements were relaxed for medical certification standards for air traffic control tower operators.[288]In that instance, the FAA relaxed the eligibility requirements of the grant of 2nd class medical certificates for air traffic controllers where (1) there was a recognized safety implication, but (2) there was a qualified back-up person available to take over the failed operator's duties in case of incapacitation, and (3) all affected individuals received an added benefit equally. Similarly, but less critically here, aviators subject to the age 60 rule (commercial pilots with commercial ATP license and

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[288] Amendment 67-4, Distant Visual Acuity: First- and Second-Class Medical Certificates, 30 Fed. Reg. 14562, November 23, 1965.

Class I or Class II medical certificate) seek a relaxation of informal exemption criteria - departure from the no-exemptions policy - upon a realization that (1) there is no safety consequence involved, (2) there is 100 percent back-up for every commercial pilot subject to the age 60 rule, and (3) all affected aviators will be eligible to receive the benefit equally. Thus, FAA's relaxation of the no-exemption policy for pilots subject to the age 60 rule, like the procedure in Amendment 67-4 for air traffic controllers, is merely procedural in nature; therefore prior notice and public comment thereon are not required. The exemptions here requested thus may be granted now and become effective within 30 days.[289]

However, if the FAA decides not to grant the present petitioners' request without prior notice and public comment, the following summary of this petition is intended for publication in the Federal Register:

Statement for Publication in the Federal Register

Ten pilots around age 60 have requested exemption from the age 60 rule, 14 C.F.R. 121.383(c). These exemptions will not harm safety, because the rule has nothing to do with safety. FAA officials have misrepresented the rule's purpose and effect. The Administrator created the rule as a personal favor for an airline executive who had lost labor disputes over an airline retirement policy. The FAA rigidly has enforced the rule as a favor for airline executives who mistakenly believe that exemptions would impose undue

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[289] An additional, alternative mechanism, by which the agency may "immediately and without [prior public] notice" grant exemptions, is provided by 49 CFR 46105. It authorizes the Administrator to act when "an emergency exists related to safety in air commerce and requires immediate action," with a proceeding to follow later. The agency recognizes that emergency conditions within the meaning of 49 CFR 46105 exist under the circumstances of the ongoing war against terrorism.

cost and inconvenience. The FAA has obstructed discovery of relevant evidence. Thanks to "fail safe" procedures, pilot incapacitation (which is not age-related anyway) poses no threat to safety in multicrew air carrier operations. FAA has failed to consider the fact that regular pilot performance and medical checks prevent risk. Exemptions will remedy unreasonable discrimination that has no safety basis; help curb major airline recruiting of pilots needed by smaller airlines and the Armed Forces; and aid the war against international terrorism by enabling the most experienced, safe pilots available to be in command of civilian airliners at all times.

July 10, 2002
San Francisco, California

/s/
ANTHONY P. X. BOTHWELL
Attorney for Petitioners

THE EXHIBITS THAT WERE ATTACHED TO TH S PETITION ARE AVAILABLE FOR REVIEW FROM THE LOWER COURT RECORD.

PETITION
Pilot's administrative petition
AMENDMENTS I, II, III

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DOCKET NO. FAA-2002-12501

AMENDMENT TO PETITION FOR EXEMPTION

Introduction

This is an amendment to the petition, on behalf of Dallas E. Butler and nine other members of the Professional Pilots Federation, that was signed by counsel June 10, 2002, received by the United States Department of Transportation Docket Management System June 13, 2002, and announced in the Federal Register September 10, 2002. The petition consisted of 76 pages of text, 289 footnotes and 35 exhibits. The purpose of this limited amendment is to provide two technical corrections and a brief update to the original petition.

Errata

Due to a collating error, an April 14, 1972 two-page FAA outline entitled "AGE 60 RULE" was included in Exhibit V. The exhibit should have Consisted of a five-page FAA document entitled "Analysis of Comments - Age 60 Hearing

-October 1972" along with the January 17, 1972 memorandum by P. V. Siegel; both are enclosed herewith (Exhibit V).

It has been discerned that, due to a collating error, the January 14, 1980 memorandum by H. L. Reighard that should have comprised Exhibit BB was not correctly inserted in the filed petition. A copy of the seven-page memorandum is enclosed herewith (Exhibit BB).

Due to a typographical error, the petition incorrectly indicated the date of July 10, 2001. The document was executed on June 10, 2001.

Update

The validity of claims set forth in the present position has gained increasingly wide recognition.

TIME Magazine Aviation Correspondent Sally B. Donnelly, wrote in the September 30, 2002 issue of TIME:

> Yet today, at a time when many people 60 or older are healthier and more robust than ever, the Age 60 rule has come under a new challenge. Ten pilots have filed a petition with the FAA, claiming that the agency's establishment of the rule had nothing to do with safety but instead was a back-room deal to rid major airlines of highly-paid senior pilots. The 76-page appeal, which uses previously unreleased documents obtained by the petitioners, claims that the agency has dismissed or ignored research showing that older pilots are as safe as their younger colleagues. "This is the government version

> of CEO fraud," says Bert Yetman, president of the professional pilots federation, a group that has been working since 1991 to change the rule and is backing the petition. "Only this time it is our government itself- the FAA - that is committing the fraud."[1]

AVIATION WEEK AND SPACE TECHNOLOGY Transport Editor John Croft wrote in an August 5, 2002 article:

> While scores of aviators have fought to overturn or get exempted from the "age-60" rule in various federal courts for more than 40 years - always unsuccessfully - the fate of these nine men and one woman may be different. While the group fully expects the next FAA administrator to deny their request, they say the lawsuit they plan to file afterward will expose a twisted tale of an ill-conceived regulation and four decades of fact manipulation to keep it in place.
>
> ...[T]he pilots are being represented by attorney Anthony P. X. Bothwell, who prepared the 76-page exemption request that included hundreds more pages in letters and documents obtained through the Freedom of Information Act (FOIA). Bothwell's tale is riveting and would seem credible, given this new information.

* * *

---

[1] Sally B. Donnelly, *Is 60 Too Old?* TIME (Sept. 30, 2002) A4. (Exhibit JJ.)

Former FAA chief counsel Gregory Walden said if the rulemaking were indeed proved a "product of fraud," Yetman's pilots might have a chance at overturning it.[2]

November 18, 2002
San Francisco, California

/s/
ANTHONY P. X. BOTHWELL
Attorney for Petitioners

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[2] John Croft, *Pilots Renew Fight Against Age-60 Rule*, AVIATION WEEK & SPACE TECHNOLOGY (Aug. 5, 2002). www.apaaas.org/aviationweek.htm (visited Nov. 16, 2002). (Exhibit KK.)

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June 13, 2003

United States Department of Transportation
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DOCKET NO. FAA-2002-12501

SECOND AMENDMENT TO PETITION FOR EXEMPTION

This is the second amendment to the petition filed on behalf of Dallas E. Butler and nine other members of the Professional Pilots Federation, received June 13, 2002 by the United States Department of Transportation Docket Management System. The purpose of this second amendment is to point out for the record:

1. All communications pertaining to the petition should be sent to my attention at the new address shown above.

2. The Department of Transportation has failed to act even though a full year has passed since the petition cited irreparable harm in support of exemption to take effect not later than 120 days from the date of filing, June 13, 2002.

3. The Department of Transportation has failed to acknowledge receiving the first amendment[1] other than by signing the certified mail receipt[2] seven months ago.

4. The Federal Aviation Administration, violating the Data Qualify Act and Office of Management and Budget guidelines, failed to act on a complaint that it has used in the past and currently disseminates to the public false and misleading data in defense of the age 60 rule.[3]

4. Enlightened executives of major U.S.-based airlines say they would welcome a change in the Federal Aviation Administration's age 60 policy.

June 13, 2003
San Francisco, California

/s/
ANTHONY P. X. BOTHWELL
Attorney for Petitioners

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[1] The first amendment, executed and express-mailed November 18, 2002, corrected errata and called attention to growing public opposition to the obsolete age 60 rule.

[2] United States Postal Service certified mail return receipt for item no. EU-176670309US. (Exhibit LL.)

[3] Recently, after a delay of three months, when directed to do so by the Office of Management and Budget, the Department of Transportation ordered the Federal Aviation Administration to open a formal docket for the complaint filed by Samuel D. Woolsey. (Docket no. FAA-2003-14951-1.)

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August 20, 2003

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DOCKET NO. FAA-2002-12501

THIRD AMENDMENT TO PETITION FOR EXEMPTION

This is the third amendment to the petition that was filed on behalf of Dallas E. Butler and nine other members of the Professional Pilots Federation, received June 13, 2002 by the United States Department of Transportation Docket Management System. The purpose of this third amendment is to point out for the record:

1. The following two pilots are added as petitioners:

    Tom Gamble
    431 Sea View Drive
    Aptos, CA 95003
    DOB 1/13/45

Paul Turner III
1414 Bershire Lane
Charlotte, NC 28262
DOB 9/10/46

2. The Department of Transportation still failed to act on the petition, which was filed more than fourteen months ago.

3. The Department of Transportation failed to acknowledge receiving the first and second amendments other than by signing certified mail receipts.[1]

August 20, 2003
San Francisco, California

/s/
ANTHONY P. X. BOTHWELL
Attorney for Petitioners

[1] Delivery of the second amendment, a one-page update, was evidenced by United States Postal Service certified mail return receipt signed June 23, 2003. (Exhibit MM.)

(2)

No. 04-1233

In The Supreme Court of the United States

DALLAS E. BUTLER, JEANNIE C. DE LAMOS, ALAN J. DE SA, TOM GAMBLE, WOODROW M. HASSINGER, RUDY MACK, SR., JOE R. MCCABE, PHILIP B. NASH, MICHAEL L. OKSNER, WILLIAM SIEGEL, PAUL TURNER III, AND ARTHUR B. WARD,

Petitioners,

v.

FEDERAL AVIATION ADMINISTRATION, AND UNITED STATES OF AMERICA,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MOTION FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE* AND BRIEF OF AGE60RULE.COM (SAMUEL D. WOOLSEY, J.D.) AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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TO THE COURT AND ALL PARTIES:

Through counsel, Movant, Age60Rule.com (Samuel D. Woolsey, J.D.), requests leave to file an *amicus curiae* brief in support of the grant of *certiorari*, in the above-captioned case. Movant Woolsey is the sole author of this brief. Following careful review, but without editorial or other input, Anthony P.X. Bothwell (Bothwell) counsel of record for Age60Rule.com, submits on behalf of Movant. Bothwell also is counsel of record for Dallas E. Butler, *et al.*, the Petitioners (with the consent of both Movant and Petitioners, there being no conflict of interest).

Movant Woolsey began investigating and reporting on the regulatory, legal, medical, and factual history of the FAA's age 60 rule in the early 1990s. For years, Woolsey has been approached by interested parties from throughout the legal, medical, media, and aviation communities, including some from the FAA, seeking information and expert advice on issues related to, and the FAA's decades-long defense of, the rule. In 2001, Woolsey created Age60Rule.com as a non-profit educational and research resource, together with the related internet website, www.age60rule.com, to more easily disseminate his substantial volume of data and archived materials to an increasingly interested and growing public.

The *amicus curiae* brief submitted here offers a cogent and original analysis pertaining to *the threshold issues* this Court will face before deciding on the grant of *certiorari* as requested.

Respondent Federal Aviation Administration, through the Solicitor General, has withheld permission to file this brief. Although the Court generally disfavors motions to file *amicus* briefs where any party has withheld consent, undersigned counsel believes that the attached brief will be

uniquely helpful to the Court in evaluating the request pending in this case.

April 6, 2005

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INTEREST OF AMICUS CURIAE[1]

Age60Rule.com (Samuel D. Woolsey, JD) is an independent non-profit educational research resource for issues related to the Federal Aviation Administration's age 60 rule. All Age60Rule.com materials are available to the public through the internet website: www.age60rule.com.

STATEMENT OF THE ISSUES

Two threshold issues confront this Court before Petitioners' requests for exemptions can be properly considered. These issues are: (1) The roll of judicial oversight in the modern American administrative State; and (2) the consequences of judicial abdication of its proper roll in that oversight.

SUMMARY OF THE ARGUMENT

In this Court's consideration of this petition for a writ or certiorari, it must first define the essential elements of the FAA's decades-long defense of its age 60 rule. This is necessary not only because of the narrowness of the rule—it applies only to pilots and carriers operating large aircraft in common carriage—but because, as explained below, no such discipline has been adopted previously by any American court. The result has been a judiciary blinded first by prejudice, then by precedent; an agency utterly contemptuous of the judiciary to which it is—or should be—by statute, subject; and a near half-century of tension clogging both agency and judicial calendars.

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[1] This brief was authored and is funded by Samuel D. Woolsey, JD., with neither input nor asssistance from counsel for either party. Anthony P.X. Bothwell, Esq., counsel of record for Age60Rule.com, submits on behalf of Age60Rule.com.

A

JUDICIAL OVERSIGHT IN THE MODERN AMERICAN ADMINISTRATIVE STATE

Virtually every treatise on this subject opens urging a presumption of regularity and judicial deference to agency expertise. None, however, discuss the consequence should this oversight descend into blind affirmation and unbridled deference. The result of either, most certainly of the two, together, is a loss of the authority, independence, and respect wrought for itself two centuries ago by John Marshall in his seminal Marbury v Madison.

The issues of presumption and deference are significant here because when created in 1958,[2] the FAA's actions were intentionally made subject to judicial review.[3] Further, during floor debate, Rep. Meader (Mich.) complained: "This bill vests dictatorial power in one man. In this bill, we are creating an aviation czar."[4] A criticism the incoming Administrator, Elwood Quesada, had already accepted:

> The Administrative Procedures Act, under which these [FAA] regulations will be issued, and a provision for appeals to the courts, provides the necessary safeguards against arbitrary action on the part of the issuing authority ... [5]

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2 Federal Aviation Act of 1958, H.R. No. 2360, 85th Cong., 2d Sess. (1958), *reprinted in* U.S. Code & Cong. & Admin. News, 3741 *et seq.* (P.L. 85-726). Hereafter FAAct.

3 FAAct Sec. 1006(a). (72 Stat. 795).

4 Cong. Rec. Aug. 4, 1958 *at* 16087.

5 Letter, E.R. Quesada to Rep. Orrin Harris, Chairman [House] Committee on Interstate and Foreign Commerce dtd. July 24, 1958, *reprinted in* U.S. Code & Cong. & Admin. News at 3761

Despite these legislative concerns, statutory protections, and agency acceptance, no clearer examples of blind affirmation and unbridled deference exist than in the judiciary's response to the first challenges to the age 60 rule, suits to first delay then prohibit its enforcement.[6] There, both the district and appellate courts abandoned their duties as jurists to become advocates for the rule, for the agency, and for its Administrator.

1. ALPA v Quesada: Deference to Advocacy:

If nowhere else in the administrative State, the plaintiffs in ALPA v Quesada had a right to expect—and the judiciary a duty to deliver—a fair hearing on the evidence, free of animosity toward themselves, or favor for the agency or the person of the Administrator. Although pursuing a legal right established in three prior binding arbitrations,[7] the pilot plaintiffs were denied both.

In rejecting their plea for a preliminary injunction, the district court's Judge Bicks opened with a scathing condemnation of the plaintiff pilots and their motives:

> Any attempt to weigh the countervailing considerations of dollar loss to the approximately 40 pilots against the public [footnote omitted] safety in air carrier operations borders on vulgarity, ... [8]

followed by an exaltation of Administrator Quesada worthy of Rep. Meader's Czar:

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[6] ALPA v Quesada, 182 F. Supp. 595 (S.D., N.Y., 1960); 276 F.2d 892 (2d Cir. 1960); 286 F.2d 319 (2d Cir. 1961).

[7] *See* Notes 22, 23, below, and Petition notes 21-26, Exhibits B, C, and associated texts.

[8] ALPA v Quesada, 182 F. Supp. 596.

> ... as against the determination made by Lt. Gen. Quesada, Commanding General of the 9th Tactical Air Command from the time of invasion of Normandy until the termination of air hostilities in Europe, with an accumulated experience of 12,000 (twelve thousand) hours as a pilot, now serving as Administrator of the Federal Aviation Agency, ... [9]

Nor was Judge Bicks' endorsement of Administrator Quesada's supporting evidence any less deferential:

> ... the report from the President of the Aerospace Medical Association: 'Our Association supports the Federal Aviation Agency in making this regulation in the interest of public safety * * * Insight into the validity of this regulation in the realm of public safety is very well summarized in the editorial from the Washington Post of December 8, 1959, entitled, 'Pilot Age and Safety' [footnote omitted] '; (3) the statement of Harry F. Guggenheim, aviation authority and chairman of the governing body of the Cornell-Guggenheim Aviation Safety Center, released May 19, 1959, ... [10]

The statement is misleading, incomplete, and in reverse order. The extended remarks were actually those of Quesada at a Daniel and Florence Guggenheim Foundation board meeting on May 18, but released the next day with attribution to Guggenheim.[11] The December 8th newspaper piece was a by-line, not an editorial, appeared three days *after* the rule's publication, and was based largely on the Foundation press release. The statement attributed to the Aerospace Medical Association also appeared *after* the rule's

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9 *Ibid.*

10 *Ibid.*

11 Minutes, Foundation and Executive Committee Meeting, Daniel and Florence Guggenheim Aviation Safety Center, May 18, 1959.

publication (January 1960) as the personal and editorial comment of its president. This was not an endorsement by the Association as it was based on, and quoted extensively from, the newspaper article.[12]

The only portion of Judge Bicks' opinion that might *appear* to support a safety rationale for the rule was a comment from the Handbook of Aging and the Individual, authored by Ross McFarland, edited by James Birren (1959):

> ... The process of aging is of greater significance for airmen than for most occupational groups because of the exacting demands on their individual abilities. * * * Slowing reaction times for complex performance may reduce a pilot's ability to take the necessary actions required by modern, high speed jet aircraft. These changes may vary greatly from one person to another in both nature and extent, but even minor deterioration in many of the psychological and physiological functions may interact to produce *a significant loss in general efficiency.* [13] (Italics added, *see* note 16 and text, below.)

Here, too, Judge Bicks' recitation is incomplete, out of context, and misstates McFarland's message. In lines omitted from Bicks' opinion, McFarland balances the older pilots' "slowing reaction times" with "improved safety records" due to their greater knowledge, experience, and judgment:

> ... [I]t may be expected that the judgment and experience of the older pilots may also contribute to the improved safety records and be of special value in the

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12 *See* Petition notes 60, 61, Exhibit T and associated texts.

13 McFarland, R, *et.al., Work and Occupational Skills* in Handbook of Aging and the Individual, Psychological and Biological Aspects (Birren, J., Ed.) University of Chicago Press (1959), 452-497, 471.

> handling of large and expensive equipment. Although the younger pilot may be as competent in the actual flying of a plane, repeated flights under many adverse circumstances give the older man a wider range of knowledge upon which to base his decision. ...[14]

Throughout his essay, McFarland repeatedly promotes the value of experience over age. Three examples:

> ... the ratio of fatal accidents to all accidents is highest in the youngest age groups ...

> ... that there is no definite increase in the number of accidents with age suggests that factors other than age may be important determinants ...

> Undoubtedly, the most important advantage which the older pilot has is the experience he has gained in flying various types of equipment under all conditions. ... The individual who has not learned by experience to exercise a high order of judgment sooner or later gets into difficulties and is eliminated from the active flying group.[15]

Further, McFarland's concern was not safety, but efficiency, note the italicized phrase above, "*a significant loss in general efficiency.*" McFarland expanded on this point, again, with words omitted from Judge Bicks' opinion:

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14 *Ibid.*

15 *Id.*, all three at 476.

> It should be kept in mind ... that the present vitality and rapid growth of the aviation industry are intimately related to the youthfulness of the personnel and might be best maintained by an early retirement age. [16]

As for McFarland's several suggestions that air carrier pilots should retire "at about" 60, (one example):

> Although it is not yet possible to establish a retirement age for civil airline pilots based on scientifically determined facts, enough is known about the aging process to suggest that these pilots should retire at about the age of 60. ...[17]

the record shows that both McFarland and Birren had attended, by invitation, a confidential presentation by Quesada to enlist scientific support before initiating his rule.[18] Held three weeks before publication of the NPRM, the attendees were presented with transition training times for older pilots, union seniority issues, and costs[19]—nothing alluding to safety—and asked to keep the meeting "confidential."[20] That this secret meeting became the basis for McFarland's "age 60" suggestions is demonstrated by the specific age he mentions—60—and a reference to the proposed rule in his text:

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16 *Id.*, at 471

17 *Ibid.*

18 *See* Petition, notes 35-38 and associated text, together with Exhibits J, K, and L.

19 These data were later declared inadequate to support the mandatory retirement rule by FAA in-house counsel. *See* Petition, footnote 43, Exhibit Q and associated text.

20 *See* Petition, Exhibit K and text.

> The United States Federal Aviation Agency is proposing to rule that the retirement age shall be fixed at 60 and that no civil airline pilot shall be allowed to qualify to fly jet passenger aircraft after the age of 55.[21]

The remainder of Bicks' opinion dismisses the three arbitrations that had established the pilots' right to continue flight past age 60 on the basis that the government had not been represented, together with a gross misrepresentation of Western Airlines' "safety" defense. Judge Bicks:

> We are not informed of the proof before this arbitrator, but in appraising the weight to be given to it in this proceeding, it should be observed that "*at some age--say 90--*" he "*would take judicial notice of impairment beyond all reason.*" Furthermore, and importantly—it does not appear that the public interest—in the person of a representative of the appropriate governmental agency—was represented.[22] (Italics added, see below.)

Here, too, Bicks' statement is incomplete, out of context, and misleading. The more complete passage reads:

> ... (4) Federal authorities have chosen to attribute nearly all airplane accidents to weather conditions, mechanical failure, or other causes not related to pilots' physical deficiencies; (5) temporary physical impairment can occur in any given individual at almost any age, and this is the apparent reason that commercial airplanes carry co-pilots, regardless of the youth of the pilot; (6) the Carrier here has shown no relationship between age of pilot from its own experience or from any other carrier's

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21 Handbook of Aging and the Individual, at 471.

22 ALPA v Quesada, at 598.

> experience; and finally (7) the normal way to determine physical ability or inability is through reasonable and universally accepted medical examinations, which are available to the carrier here.
>
> Thus, there is no testimonial basis and no "fact of life" on which we could be expected to take a kind of "judicial notice" that supports the view that it is unsafe to let a pilot perform after the age of 60. *This is not to say that there is not some age – say 90 – when we would take judicial notice of physical impairment beyond all reason.* It is enough to say that the evidence here does not support the theory that attainment of age 60 is in itself enough to disqualify a pilot.[23] (Bicks' reference in italics.)

Through his personal biases, citation to irrelevant, post-hoc testimony, incomplete, out of context, and misleading citations to relevant evidence, and failure to identify any credible evidence to support either the rule or his decision, Judge Bicks abandoned his role as judge to become an advocate, unable to see beyond the person of his idol, "Lt. Gen. Quesada, Commanding General of the 9th Tactical Air Command from the time of invasion of Normandy until the termination of air hostilities in Europe, ..."

2. ALPA v Quesada: The 2nd Circuit as Accomplice:

ALPA appealed Judge Bicks' denial of the temporary injunction, and lost.[24] In its first affirmation of the district

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[23] Extract appears in: Ruppenthal, K.M., *Compulsory Retirement of Air Line Pilots*, 14 Indus. & Lab. Rel. Rev., 528, 534-35 (1961). The original arbitration is not available. But the portion appearing here was reported by an authority in the field, published contemporaneously in a peer-reviewed journal, of appropriate subject matter, more than 20 years ago. (Ref: FRCP 901(b)(8)). *See also* Petition, notes 21-25 and associated texts.

[24] ALPA v Quesada 276 F.2d 892 (2d Cir. 1960)

court's decision, the 2nd. Circuit's panel continued Judge Bicks' practice of misstating the evidence.

> Pursuant to [his] statutory authority the Administrator and his medical staff in the fall of 1958 began a study concerning the aging process and the diseases and physiological deterioration that accompany it in an effort to determine whether a maximum age should be set for service by commercial pilots.[25]

The statement is incomplete, incorrect, and misleading. The FAA did not initiate its study of a maximum age limit for commercial airline pilots until February, 1959.[26]

The *1958* study was not on age-60, but on medical certification standards, initiated in response to two reports on that subject by the independent Flight Safety Foundation (FSF).[27] This 1958 study led to another 1959 rulemaking on medical certifications, overlapping that for the age 60 rule by four months.[28] Except for one suggestion appearing in the first FSF Report concerning air traffic controllers only,[29] neither study addressed age or age limits for any class of

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[25] *Id.*, at 895.

[26] *See* Petition, notes 3-27, Exhibits A-D, and associated text.

[27] Flight Safety Foundation, Inc., FCF/CAA Medical Study (Report No.1), Physical Qualifications of Air Traffic Control Personnel, New York, 21 Feb. 1958, at 86-7; Flight Safety Foundation, Inc., FCF/CAA Medical Study (Report No.2), Medical Aspects of Civil Aviation, New York, 31 Mar. 1958, at 69, 71. *See* Petition, notes 7, 16, 17 and associated text.

[28] 24 Fed. Reg. 2257 (Mar. 21, 1959) NPRM, Physical Standards for Airmen, Medical Certificates; 24 Fed. Reg. 7309 (Sep. 11, 1959) Final Rule, Physical Standards for Airmen; Medical Certificates, Amendment to Medical Standards.

[29] Report No.1, at 86-7. *See also* Petition, notes 7, 16, 17 and associated text.

airmen. The second FSF report examined pilots, supported medical waivers for them, made no mention of an age limit, and found no reason to change their medical criteria for the newly introduced jet transport aircraft.[30]

While one might be misled by the similar issues raised in the two rulemakings, even a cursory review would have revealed their differences—in both finding and purpose. On its face, the 2nd Circuit's decision suggests that it may have been unaware of the separate rulemaking on medical standards, and considered only the FAA's briefs and Judge Bicks' advocacy for its age 60 ruling.

3. The 2nd Circuit's Second Failure in Oversight:

With a subsequent request for a permanent injunction also denied by Judge Bicks, ALPA again appealed to the 2nd Circuit, and were again rebuffed.[31] In this second rejection, the Circuit incidentally upheld Judge Bicks' refusal to order a deposition of Quesada, losing any chance to discover and assess the full scope of the evidence advanced by the FAA in support its rule.[32]

Moreover, by these four decisions, the age 60 rule was affirmed as a valid exercise of the Administrator's regulatory authority, becoming the "precedents" on which all later courts relied in their refusals to reexamine the issue:

> ... As things are now, *if the Age 60 Rule is reasonable, as it has been held to be*, it is not abuse of discretion to reject any individual application for exemption even if the applicant demonstrates that he personally is a superman

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30 Report No.2, at 69, 71. *See also* Petition, notes 7, 16, 17 and associated texts.

31 286 F.2d 319 (2d Cir. 1961)

32 *Id.*, at 320. *See also* note 34 and associated text, below.

immune from the impairments that age normally inflicts.[33] (Italics added.)

This unremitting reliance on the Bicks/2nd Circuit's decisions is unfortunate, as the FAA lost the entire age-60 docket in 1974,[34] while preparing for its first substantive defense of the rule.[35] Thus, neither challengers, defenders, nor courts have since had access to the materials that would support or refute a valid, original basis for the rule.

B

THE LEGACY OF UNBRIDLED DEFERENCE:

The legacy of unbridled deference is utter contempt and unending litigation.

1. Unbridled Deference:

In assessing the legacy of unrestrained deference within the age 60 context, it must be understood that the FAA did not in 1959, and has never since, argued that advancing age, *per se*, compromises safety in air carrier operations. The FAA's argument has always been that the incidence of critical medical defects increases with age, and it is these medical defects, primarily incapacitations due to heart attacks, that in turn, *potentially* increases the risk of accident—but never argued in the narrow, Part 121 air carrier context.

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[33] Starr v FAA, 589 F.2d 307, 312-313 (7th Cir. 1978).

[34] Memorandum, Louise Coomes, AGC-24 to Associate General Counsel, Regulations and Codification Division, subject: Missing Regulatory Dockets 40, 41, and 42 dated July 11, 1973.

[35] O'Donnell v Shaffer, 491 F.2d 59 (D.C. Cir. 1974).

In that context, Congressionally mandated[36] findings of two federal scientific agencies (the Institute of Medicine (IOM), and National Institute on Aging (NIA)), should be significant, if not compelling. In the first, following an exhaustive review of the literature, the IOM found (1981):

> . . . For significant acute events (such as cardiovascular events and stroke), age 60 does not mark the beginning of a special risk or a special increase in risk, although, on average, risk increases with age. Subtle changes that may adversely affect pilot performance also increase with age. ... However, age 60 is not an age of special significance for these subtle changes either.[37]

Addressing risk in air carrier operations, specifically, the IOM found:

> Acute incapacitation of the pilot is not significant as a cause of airline accidents. No [air carrier] accidents were attributed to incapacitation during the period 1968-1977. Because the cockpit crew includes a co-pilot and a flight engineer who can take over the controls, most incapacitations, when they occur, do not cause accidents. ...[38]

These observations were not novel in 1981. They merely repeated many of the FAA's own admissions over the

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[36] Pub.L. 96.171, Dec. 29, 1979. Through five specific questions, Congress ordered the Secretary of Transportation to determine whether the age 60 rule was warranted.

[37] Airline Pilot Age, Health and Performance: Scientific and Medical Considerations, Report of a Study by the Committee to Study Scientific Evidence Relevant to Mandatory Age Retirement for Airline Pilots, Institute of Medicine, National Academy of Science, Washington, D.C., March 1981, at 4.

[38] *Ibid.*

preceding decades. Examples: In 1966, FAA declared that air carrier pilots were "a highly select group . . . more free of serious pathology than a sample of the general population of similar age."[39] Starting in 1973 and continuing through at least 1990, the FAA declared, in at least nine annual/bi-annual reports, that airline pilots are "essentially purged of disease prevalence that contributes to higher [disqualification] rates for other non-pilot groups."[40] In 1978, in testimony before Congress, the Federal Air Surgeon conceded that "the precision in medicine is the same regardless of age,"[41] and the FAA's Deputy Administrator affirmed that the FAA held that co-pilots made the air carrier system "fail-safe" for pilot incapacitation.[42] In 1980, the year before the IOM report was issued, FAA conceded in court that it had and applied a protocol for the detection, diagnosis, tracking, and grant of waivers for Part 121 air carrier pilots with cardiovascular disease.[43] In that case, FAA conceded that its liberalized airline pilot exemption policy had begun in 1972, covered six of nine "absolutely disqualifying" medical conditions by 1980; but the required "special testing and evaluation requirements" were only

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39 Better Management Needed of Medical Research on Aging, 38th Report by the Committee on government Operations, 89th Cong., 2d. Sess., September 26, 1966. H.Rep. 2080, Appendix B (FAA statement), p. 19.

40 Booze CF, Characteristics of Medically Disqualified Airmen Applicants During Calendar Year 1971, FAA Office of Aviation Medicine, AM-74-5, May 1974, at 4. *See also*, Petition, notes 217-221 and associated texts. The several authors of these FAA studies were FAA/CAMI employees Booze, S. Dark, and L. Downey.

41 Age Discrimination Against Airline Pilots; Hearing before the Select Committee On Aging, House of Representatives, 96th Cong., 1st Sess. March 21, 1979. Comm. Pub. No. 96-183, at 51.

42 *Id.*, at 53. *See* Petition, footnotes 214, 62, 131, and associated texts.

43 Delta Air Lines v U.S., 490 F. Supp. 907 (N.D. GA 1980). The protocol is reprinted in the opinion as "Appendix A."

"rarely" performed.[44] A subsequent GAO report reveals that by 1989, the FAA had expanded these exemptions to all "absolutely disqualifying" medical conditions for Part 121 air carrier pilots except insulin dependent diabetes—and a 60th birthday.[45]

Following review of the IOM report, three public hearings, and scores of written submissions, the National Institute on Aging Panel similarly found no "medical evidence to support age 60, or any other specific age for mandatory pilot retirement"[46] (underling in the original), recommended the grant of exemptions to air carrier pilots, and provided a protocol therefor.[47] The NIA panel declined to make a conclusive recommendation on the rule due to the lack of operational data on which to base such decision, harshly blaming the FAA directly for this deficiency.[48]

In rejecting the first petition for exemptions following these reports,[49] the 7th Circuit ignored the above, relied heavily on the 28 year-old ALPA v Quesada, spoke much of "increased risk of incapacitation" and "deteriorating skills," but made no correlation of either to air carrier pilots or their risk of accident; made no reference to multi-crews, co-pilot presence, or "fail-safe" Part 121 air carrier systems; and cited to no air carrier accidents or incidents charged to these

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44 *Id.*, at 914.

45 GAO Fact Sheet, Aviation Safety, Information on FAA's Age 60 Rule for Pilots, GAO/RCED-90-45FS, November 1989. At 16.

46 Report of the National Institute on Aging Panel on the Experienced Pilots Study, Department of Health and Human Services, NIH, NIA, Bethesda, Md. 20205, August, 1981. (At 1, 2.)

47 *Id.* at 22-25.

48 *Id.*, at 17.

49 Aman v FAA, 856 F.2d 946 (7th Cir. 1988).

defects from the earliest days of commercial aviation onward. The court identified and cited to two expert witnesses for interested parties (the Air Transport Association and ALPA), and three not included in the exemption docket—Flinn, Billings, and Acker—all supporting the rule. (At 953.) Conversely, for the pilots, it declared: "A detailed recitation of the petitioners' evidence would serve no useful purpose." (At 954.) With respect to the Congressionally mandated IOM and NIA reports, the court made no reference to the IOM findings, and repeated the NIA Panel's recommendation "that the rule be retained as a general policy," accepting, without question, the FAA's refusal to grant the exemptions as recommended. (At 948.)

This is abdication, not deference.

2. Utter Contempt:

Following the IOM and NIA criticisms of its (then) 2-decades old medical/incapacitation arguments, FAA commissioned, in 1982, the Golaszewski Flight Time Study to produce a statistical proof of increasing risk above age 60.[50] Using unvalidated data and an invalid methodology defined only in a footnote, FAA manufactured multiple charts falsely illustrating an increase in risk beginning precisely at age 60. Unfortunately—for the FAA—its own Office of Aviation Safety had rejected and refused to publish the study at delivery "because there are major data deficiencies [and] other problems ... discussed by experts in

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[50] Golaszewski RS, The Influence of Total Flight Time, Recent Flight Time and Age on Pilot Accident Rates, Acumenics Research and Technology, Inc., Bethesda, Maryland, Order No. DTRS57-83-P-80750, June 30, 1983.

the aviation field and in my office."[51] Despite this summary rejection from within and universal criticism without,[52] FAA has promoted this study and its flawed results to the courts, to the public, to Congress, and to the international aviation community *ever since* as "the best scientific evidence" that risk increases above age 60.[53] Among FAA's targets of misinformation were the 7th Circuit in Baker,[54] and the Government Accounting Office (GAO).[55] Through proxies, this discredited and misleading formulation from this discredited and rejected study was also falsely promoted to Congress' Office of Technology Assessment (OTA) as a NASA Ames product,[56] and to the Australian courts and Human Rights Commission.[57].

Because the agency was aware of the study's flaws and its own misrepresentations, its submission to the 7th Circuit in Baker was probably simple fraud. For the same underlying reasons, an FAA official's representation to the GAO was

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51 Kenneth M. Chin, Executive Officer, Office of the Assistant Administrator for Aviation Safety, FAA, letter to Samuel D. Woolsey ([month illegible] 24, 1991). *See* Petition, note 81 and related text, Exhibit U.

52 *See* Petition, notes 243-246, 248-250, 257 and associated texts for range and credentials of authorities criticizing the study, as well as their descriptions of the flaws.

53 *See, e.g.*, Petition, notes 32, 113, 119, 127, 134 and associated texts. The "fourth report" cited by FAA in the instant case (Denial, page 11) was a replication of its earlier Golaszewski misrepresentations (*See* Petition, notes 143-49 and texts.)

54 Baker v FAA, 917 F.2d 318 (7th Cir. 1990)

55 GAO Fact Sheet, Aviation Safety, Information on FAA's Age 60 Rule for Pilots, GAO/RCED-90-45FS, November 1989, at 17.

56 *See* Petition note 248.

57 *See*, Petition, Notes 244-258 and associated texts.

potentially prosecutable as a felony under 18 U.S.C. § 1001(a)(2), (3), and/or (c)(2). *See* Brogan v US, No. 96-1579 (1998) where even the "exculpatory no" is not excused.

Today, the FAA's best defense of its rule is the long list of judicial affirmations, starting with those of Judge Bicks and the 2nd Circuit in ALPA v Quesada.[58]

3. Unending Litigation:

When the 7th Circuit, in Baker, observed that the pilot/petitioners faced a "Catch-22"—"they cannot get exemptions until they show they can fly large passenger aircraft safely, and they cannot show they can fly such planes safely until they get exemptions"—it revealed, albeit unwittingly, that it had been flummoxed. As noted above, the FAA has never argued that increasing age, *per se*, increases risk. In its formulations in 1959, before Judge Bicks in ALPA v Quesada, the 7th Circuit in Starr, Aman, and there, Baker, the DC Circuit in Yetman v Garvey, and here, Butler, et al.,[59] the FAA's argument has been that, in the *general population*, certain medical defects, primarily incapacitations, become more likely with increasing age. The FAA has never argued, however, that the air carrier pilot population is similarly afflicted (*see* notes 39, 40 and text, above), that these medical defects are not detectable in older populations (*see* note 41 and text, above), are unmanageable when detected in air carrier pilots (*see* notes 43-45 and text above), or compromise safety in the multiple-crew, fail-safe, Part 121 air carrier operating system if/when they do occur (*see* note 42 and text, above).[60]

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58 *See* FAA's Denial of Exemptions, p. 7.

59 *Ibid.* Review the Denial for a larger, but still incomplete list.

60 *See* Petition, Notes 180-208 and associated texts.

The courts will continue to face an unceasing stream of appeals on this issue unless and until they demand of the FAA a fair and honest appraisal of this core question: Do the FAA's claimed "critical medical defects," if/when they occur in the *unique, super-select Part 121 air carrier pilot population,* compromise safety in the FAA's *fail-safe, Part 121 air carrier system*? Independent of age.

Nothing less will restore to the judiciary—and to this Court—the authority, independence, and respect you must command if you are to fulfill your legitimate oversight obligations in the American administrative State.

CONCLUSION

This Court should remand to the court below with instructions to determine first whether the Administrator is a credible witness in her denial of the requested exemptions. If she is found to be, the court below should then determine whether she had before her properly admissible, credible evidence relevant to safety *in the Part 121 air carrier system* sufficient to justify her denial of the requested exemptions on that basis. If the first question is found in the negative, however, the court should be ordered consider the requests *de novo,* or assign them to a special master, with discovery, for examination and recommendation.

Respectfully submitted:

_____

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(3)

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In The
Supreme Court of the United States

DALLAS E. BUTLER, ET AL.,

Petitioners,

v.

FEDERAL AVIATION ADMINISTRATION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF *AMICUS CURIAE* OF SOUTHWEST AIRLINES CO. IN SUPPORT OF PETITIONER

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A Fresh Look At Mandatory Retirements: Do They Still Make Sense? Hearing Before the Senate Special Committee on Aging, 108th Cong., 2004 WL 2052541 (F.D.C.H.) (Statement of Russell B. Rayman, MD, Executive Director of the Aerospace Medical Association) 7

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BRIEF *AMICUS CURIAE* OF SOUTHWEST AIRLINES CO. IN SUPPORT OF PETITIONER

This *amicus curiae* brief is submitted on behalf of Southwest Airlines Co.[1] Petitioners and Respondent have consented to the filing of this *amicus curiae* brief, as indicated by the letters submitted with the filing of this brief.

INTEREST OF *AMICUS CURIAE*

Southwest Airlines Co. (hereafter "Southwest" or "Southwest Airlines"), the largest commercial airline in the United States in terms of passengers boarded, provides point-to-point, low-fare service to 60 cities in 31 states. In operation since 1971, Southwest currently serves more than 70 million passengers annually with a fleet of over 400 Boeing 737 aircraft operating approximately 2,900 flights daily. Headquartered in Dallas, Texas, Southwest has approximately 31,000 Employees nationwide and has one of the best overall Customer Service records in the U.S. airline industry. With annual revenues exceeding $6,500,000,000 in 2004, Southwest is a Fortune 500 company and one of the few profitable U.S. airlines.

Southwest is directly impacted by this case because it employs over 4,500 pilots, many approaching the age of 60. In fact, Michael L. Oksner, a Petitioner in this case, was

[1] This brief was not authored in whole or in part by counsel for a party. *See* Sup. Ct. R. 37.6. It was authored by in-house counsel for Southwest Airlines Co. In addition, no person or entity, other than Southwest Airlines Co., its members, and its counsel, made a monetary contribution to the preparation or submission of the brief.

recently forced to retire from Southwest Airlines when the Federal Aviation Administration ("FAA") denied his petition for an exemption from the "Age 60 Rule." That rule, codified at 14 CFR §121.383(c), requires pilots operating under Part 121 of the FAA's regulations (*i.e.*, virtually all U.S. commercial airline pilots) to retire on their 60th birthday.

The direction and authority to evaluate this case and to file an *amicus curiae* brief herein came from Herbert D. Kelleher, co-founder and Executive Chairman of the Board of Southwest Airlines.

SUMMARY OF *AMICUS* ARGUMENT

Southwest Airlines urges the Supreme Court to grant *certiorari* as requested by the Petitioners in this case, *Butler, et al. v. Federal Aviation Administration, et al., D.C. Cir. No. 03-1386 (September 24, 2004).* The Petitioners challenge the FAA's rigid application of its Age 60 Rule, which requires all commercial pilots employed by Part 121 air carriers to retire at the age of 60 regardless of individual pilot abilities or health conditions. The current Age 60 Rule was adopted by the FAA 45 years ago and is based on obsolete data that has been superceded and refuted by more recent medical findings. This rule, coupled with the FAA's practice of automatically denying all pilot requests for exemptions regardless of merit, is arbitrary and injurious to Southwest Airlines. Exemptions for physically and mentally qualified pilots from the Age 60 Rule should be allowed to accomplish the FAA's dual statutory mandates of maximum safety and optimal efficiency in United States commercial aviation. The court below erred in acceding to

the FAA's argument that the case should not even be heard on the merits.

AMICUS ARGUMENT

I. The FAA's Application of the Age 60 Rule Without Consideration of Individual Pilot Abilities, Health Conditions, or Current Medical Data is Not Justified.

The FAA's practice of automatically denying all pilot requests for exemption from the Age 60 Rule is not medically justified. The mandatory retirement rules for pilots were established in 1959 – 45 years ago. Today, FAA data shows that pilots over age 60 are as safe as, and in some cases safer than, their younger colleagues. For example, the FAA released the Hilton study in 1993, which stated "the data for all groups of pilots were remarkably consistent in showing a modest decrease in accident rate with age [and] no hint of an increase in accident rates as pilots near age 60."[2] In addition, the National Institute of Aging stated in 1981 that "the Age 60 Rule appears indefensible on medical grounds" and "there is no convincing medical evidence to support age 60, or any other specific age, for mandatory pilot retirement."[3] Both medical technology and medical services, as well as the aging process itself, have dramatically improved since 1959. Southwest Airlines is familiar with, and agrees with, these medical studies which have concluded that there is no current health

[2] Hilton Systems, Incorporated. Kay et al. (1994).

[3] 149 CONG. REC. 63, S5607 (April 30, 2003) (Statement of Senator Inhofe (for himself, Mr. Stevens, and Mr. Burns) on the Introduction of S.959, Bill to Abolish the FAA's Age 60 Rule).

justification for automatically grounding all commercial airline pilots upon turning age 60.

Captain Joseph "Ike" Eichelkraut, President of Southwest Airlines Pilots' Association and a pilot with 25 years of experience flying both military and commercial aircraft, testified on the Age 60 Rule before the Senate Special Committee on Aging on September 14, 2004.[4] His testimony explains the many safeguards that are already in place to ensure pilots of all ages are healthy and medically fit to fly:

> The FAA already has the ideal mechanisms in place for ensuring safe pilots at *any* age . . . To retain my license and fly for Southwest Airlines, I must pass semi-annual flight physicals, administered by an FAA licensed medical examiner, that include an annual EKG. I must also demonstrate complete knowledge of safe piloting skills, systems and procedures, and semiannual check rides and advanced simulators.
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> Pilots must also successfully pass semiannual simulator training and flight checks designed to evaluate the crewmember's ability to respond to various aircraft emergencies and/or competently handle advances in flight technology and the Air Traffic Control environment . . . There is no greater test of cognitive ability and mental dexterity than these simulator rides . . . The 59 year old Captain arrives at this point in his career having demonstrated successful performance

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[4] *A Fresh Look At Mandatory Retirements: Do They Still Make Sense? Hearing Before the Senate Special Comm. on Aging*, 108th Cong., 2004 WL 2052540 (F.D.C.H.) (Statement of Captain Joseph "Ike" Eichelkraut, President, Southwest Airlines Pilots' Association).

following years of this kind of scrutiny. FAA studies have verified the superior level of safety exhibited by this senior Captain.

The documentary evidence – disclosed in the record of this case – reveals that the FAA's automatic denial of all age exemptions has no tangible safety purpose. The FAA itself even granted exemptions from the Age 60 Rule in the early 1990's to commercial pilots of foreign carriers. (Petitioners' Record Below at Exhibit HH). Because the undistorted data of pilot performance shows that older, more experienced pilots have excellent safety records, it clearly is in the interest of both the airlines and their passengers to allow qualified, medically-certified pilots to fly beyond age 60.

II. The FAA's Inflexible Application of the Age 60 Rule Undermines U.S. Airline Economics and Disserves the Traveling Public.

The 1950s-era Age 60 Rule, coupled with the FAA's rigid implementation of it, arbitrarily deprives Southwest Airlines of some of its best pilots at the peak of their careers. Southwest, which employs over 4,500 highly-skilled professional pilots, believes that the arbitrary rejection of all age exemption requests disserves the public interest by depriving commercial airlines of leadership and experience in the cockpit. This inflexible approach inhibits the industry from achieving maximum safety as well as optimal efficiency in passenger airline operations. The flight experience and training accumulated over the career of a professional pilot approaching the age of 60, along with the investment in training by that pilot's airline employer such as Southwest, is enormous. Commercial pilots have the potential for years of safe, productive aviating ahead of

them beyond their 60th birthday. Many airlines could operate more efficiently, while maintaining the highest standards of safety, if qualified pilots were allowed to continue to fly beyond age 60.

Southwest Airlines Captain Michael L. Oksner, one of the 12 Petitioners in this case, was forced to retire on his 60th birthday, April 5, 2004, because of the FAA's denial of his individual Age 60 exemption request. Captain Oksner's safety performance and medical records were unblemished. Southwest believes that he should have been granted an exemption by the FAA to continue flying. The Petitioners in this case, including Captain Oksner, should have their requests for exemption considered on the merits, not arbitrarily denied by the FAA. The agency should be required to reach its decision on such exemption requests based on the safety performance and medical records of the individual pilots, not on an arbitrary, outdated standard that the FAA imposes on all pilots regardless of individual abilities. Accordingly, we urge the Court to grant *de novo* review of the Petitioners' case, and require the FAA to follow a reasoned standard of individual consideration of Age 60 Rule exemption requests pursuant to the agency's statutory power to grant exemptions from its regulations when in the public interest (49 U.S.C. § 44701(f)).

Moreover, the FAA has a statutory duty to consider exemptions in light of paramount safety requirements in air commerce, pursuant to 49 U.S.C. § 40101(a)(1). Without lessening safety, the FAA also has a duty to consider the economic health and efficiency of the nation's air carriers pursuant to 49 U.S.C. §§ 40101(a)(6)(A) (the FAA shall consider it in the public interest "to encourage efficient and well-managed air carriers to earn adequate

profits . . . "); and 40101(a)(7) (it is in the public interest for FAA to develop and maintain "a sound regulatory system that is responsive to the needs of the public. . . . "). Southwest Airlines' analysis of the issue has concluded that safer and more efficient operations will result from reasoned consideration – instead of arbitrary denial – of age exemption requests. Therefore, Southwest Airlines believes that the Petitioners' case must be heard, for the sake of both the health of U.S. commercial aviation and the safety of the flying public.

The FAA's arbitrary no-exemptions policy for commercial airline pilots should be ended, consistent with the public interest in air safety, because it serves no safety purpose. Pilots of smaller aircraft such as those operating under Parts 91 and 125 – 137, general aviation pilots, and certain test pilots are allowed to fly beyond age 60. In addition, at least 24 nations allow pilots to fly commercial aircraft past age 60.[5] These pilots share the same airways and runways with the large U.S. passenger airlines operating under Part 121. The safe performance of these pilots and others worldwide confirms that the FAA's asserted claim of a safety basis for its no-exemptions policy for Part 121 pilots is unfounded.

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[5] *A Fresh Look At Mandatory Retirements: Do They Still Make Sense? Hearing Before the Senate Special Committee on Aging,* 108th Cong., 2004 WL 2052541 (F.D.C.H.) (Statement of Russell B. Rayman, MD, Executive Director of the Aerospace Medical Association).

CONCLUSION

For the foregoing reasons, Southwest Airlines urges the Supreme Court to grant *certiorari* to the Petitioners in this case.

Respectfully submitted,

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